Supreme Court, U.S.
FILED

10-463 OCT 5 - 2010

OFFICE OF THE CLERK

No. 10-

In The
Supreme Court of The United States

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, individually and representing a class of persons similarly situated,

Petitioners,

v.

US AIRLINE PILOTS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Marty Harper
MHarper@polsinelli.com
Counsel of Record
Kelly J. Flood
Andrew S. Jacob
Katherine V. Brown
POLSINELLI SHUGHART, P.C.
One East Washington Street,
Suite 1200
Phoenix, AZ 85004-2568
Ph. (602) 650 2000
Counsel for Petitioners

October 4, 2010

QUESTION PRESENTED

US Airways and America West merged in 2005. The airlines and their pilots agreed that a final and binding arbitration would determine how to equitably integrate the pilots' seniority lists. That arbitration was completed in May 2007. The airline has been willing to implement the arbitrated seniority list since December 2007. Nearly three years later, the pilots' union steadfastly refuses to do so. Petitioners, at a cost of $1.8 million in legal fees, obtained an order from the district court that the union must make all reasonable efforts to implement the arbitration award. In light of the federal policy favoring prompt resolution of divisive internal union disputes that affect collective bargaining, is Petitioners' claim to enforce compliance with the arbitration award ripe?

RULE 29.6 STATEMENT

No petitioners are corporations.

TABLE OF CONTENTS

Question Presented i

Rule 29.6 Statement ii

Table of Contents iii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 2

Reasons for Granting the Petition 7

I. The Ninth Circuit decided an important federal question in conflict with this Court's rulings 8

A. The Ninth Circuit disregarded a strong federal interest in prompt resolution of internal union disputes that affect collective bargaining 8

B. The federal interest in prompt resolution of internal union disputes that affect collective bargaining is particularly strong where the dispute concerns seniority integration after an airline merger 11

C. The Ninth Circuit disregarded *Clayton's* admonition that delayed adjudication of an internal union dispute must not merely exhaust an aggrieved worker..... 13

II. The Ninth Circuit misapplied prudential ripeness. 15

A. The duty of fair representation applies at all stages of union representation..... 15

B. This matter is ripe because the hardships of postponing adjudication are great and there are no corresponding benefits. 16

Conclusion 19

APPENDIX

Appendix A: Ninth Circuit opinion, dated June 4, 2010 ..... 1a

Appendix B: District Court order, dated July 17, 2009. ..... 34a

Appendix C: McCaskill-Bond Amendment, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007) 106a

Appendix D: Allegheny-Mohawk Labor Protective Provisions, §§ 3, 13..... 109a

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16

Addington v. US Airline Pilots Ass'n, 2009 WL 2169164 (D. Ariz. July 17, 2009) 1

Addington v. US Airline Pilots Ass'n, 606 F.3d 1174 (9th Cir. 2010) 1

Adler v. Bd. of Educ., 342 U.S. 485 (1952) 17

Air Wisconsin Pilots Protection Com. v. Sanderson, 909 F.2d 213 (7th Cir. 1990) 11

Alleghany-Mohawk Merger Case, 59 C.A.B. 22 (1972) 12

Bernard v. Air Line Pilots Ass'n, Int'l, 873 F.2d 213 (9th 1989) 11

Burlington N. R.R. v. Bhd. of Maint. of Way Employees, 481 U.S. 429 (1987) 11

Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558 (1990) 15

Chavez v. Director, OWCP, 961 F.2d 1409 (9th Cir. 1992) 16

Clayton v. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of America, 451 U.S. 679 (1981) 8, 13, 14

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 17

Consol. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n, 824 F.2d 1071 (D.C. Cir. 1987) ... 16

Cummings v. John Morrell & Co., 36 F.3d 499 (6th Cir. 1994) 10

Czosek v. O'Mara, 397 U.S. 25 (1970) 18

DelCostello v. Teamsters, 462 U. S. 151 (1983) 10

Frandsen v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees, 782 F.2d 674 (7th Cir. 1986) 14

Laborers & Hod Carriers, Loc. No. 341 v. NLRB, 564 F.2d 834 (9th Cir. 1977) 15

NLRB v. Marine Workers Local 22, 391 U.S. 418 (1968) 14

Panetti v. Quarterman, 551 U.S. 930 (2007) 17

Rakestraw v. United Airlines, 981 F.2d 1524 (7th Cir. 1992) 11

Reed v. United Transportation Union, 488 U.S. 319 (1989) 7, 8, 9

Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993) 16

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) 13, 15

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 8

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 17

Yahoo! v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006) 17

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

McCaskill-Bond Amendment, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007) ..... *passim*

Railway Labor Act, 45 U.S.C. §§ 151 *et seq* 11, 13, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Case No. 09-16564) (9th Cir. June 4, 2010) is reported at 606 F.3d 1174 (9th Cir. 2010). Appendix ("App.") A, 1a-33a. Petitioners' motion for rehearing *en banc* was denied by the court of appeals on July 8, 2010, in an unpublished order. The relevant U.S. District Court, District of Arizona, order is *Addington v. US Airline Pilots Ass'n*, which is unofficially reported at 2009 WL 2169164 (D. Ariz. July 17, 2009). App. B, 34a-105a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on June 4, 2010, and the order denying the motion for rehearing *en banc* was entered on July 8, 2010. This petition is timely under 28 U.S.C. § 2101(c) because it is being filed within 90 days of the entry of the order denying rehearing *en banc*. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the McCaskill-Bond Amendment, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007). App. C, 106a–108a.

STATEMENT OF THE CASE

In 2005, the airlines US Airways and America West entered into a merger agreement. App. B, 37a. More than three years have passed since the pilots from these airlines completed what they (and the airlines) agreed would be a final and binding arbitration to determine how to equitably integrate their two seniority lists. *Id.* Yet, the pilots' union, which was formed and dominated by the larger pilot group, steadfastly and emphatically refuses to implement the seniority list awarded by that arbitration.

Petitioners sought relief in the district court. At a cost of more than $1.8 million in legal fees, they obtained a jury verdict that the union, U.S. Airline Pilots Association ("USAPA"), is in breach of its duty of fair representation. The district court ordered USAPA to make all reasonable efforts to implement the arbitration award.

USAPA appealed and the Ninth Circuit dismissed the action for lack of ripeness. In doing so, it disregarded established rulings by this Court as well as federal policy strongly favoring prompt resolution of divisive internal union disputes that affect collective bargaining, a policy that Congress recognized in the specific context of airline mergers

when it passed the 2007 McCaskill-Bond Amendment.

The two pilot groups have diametrically opposite positions on seniority list integration. The West Pilots'[1] position is that pilots who were actively working at the time of the merger should be put ahead of pilots who were on furlough. App. B, 40a. In contrast, the East Pilots' position is that the seniority list should be ordered strictly by date-of-hire, even though that order would place more than a thousand East Pilots who were on furlough in 2005 (and who had not worked for years) ahead of West Pilots who were working. *Id.*

Following procedures that were subsequently codified into federal law by the McCaskill-Bond Amendment, the two pilot groups agreed to use binding arbitration to determine an equitable method of integrating their seniority lists. App. B, 41a. The result of that arbitration, referred to as the Nicolau Award, put 500 East Pilots at the top of the seniority list and placed all East Pilots who were on furlough in 2005 below West Pilots who were working. *Id.*

The East Pilots objected to the Nicolau Award and vigorously prevented its implementation. App. B, 42a. For example, they refused to participate in the collective bargaining of a new contract that would be used to implement an integrated seniority

---

[1] The pilot groups from the pre-merger airlines are referred to as West Pilots (America West) and East Pilots (US Airways).

list. *Id.* They also withdrew support from the union that was then representing both pilot groups, causing it to be decertified. App. B, 43a. They formed a new union, USAPA, that they elected to represent the bargaining unit. App. B, 44a. USAPA promised that, if elected to represent the merged pilot groups, it would disregard the Nicolau Award and would present the date-of-hire seniority list favored by the East Pilots to the airline. *Id.* This is the same date-of-hire list that was rejected by the arbitration because it put more than a thousand East Pilots who had been on furlough in 2005 ahead of hundreds of West Pilots who had been working.

Petitioners initiated an action to stop USAPA from disregarding the Nicolau Award, arguing that this puts it in breach of its duty of fair representation. App. B, 48a. The district court found this action was ripe, in part, because USAPA unequivocally repudiated any duty to implement the Nicolau Award. App. B, 86a. It explained, for example, that USAPA's "constitution includes a commitment 'to maintain uniform principles of seniority based on date of hire" and that "USAPA officers have promised to 'overturn' the Nicolau Award, and USAPA considers itself constitutionally bound never to implement it." App. B, 47a.

The district court held a jury trial to decide USAPA's liability. App. B, 50a. After a 10-day trial, the jury found that USAPA was liable because its sole objective was to benefit East Pilots, rather than the bargaining union as a whole. *Id.* The district court therefore permanently enjoined and ordered USAPA to:

1. "make all reasonable efforts to negotiate and implement a single [CBA] . . . that will implement the Nicolau Award seniority proposal. . .";

2. "[m]ake all reasonable efforts to support and defend the . . . Nicolau Award in negotiations with US Airways"; and

3. "[n]ot negotiate for separate collective bargaining agreements for the separate pilot groups. . . ."

App. A, 8a-9a.

Petitioners incurred attorneys' fees and costs in excess of $1.8 million in the district court litigation, which entailed filing more than 600 documents and a ten-day jury trial. Petitioners also lost wages as a consequence of furloughs and missed promotions that would not have occurred "[u]nder a single CBA incorporating the Nicolau Award." App. A, 8a. Petitioners sought an award of their fees and costs pursuant to common benefit doctrine and claimed damages to remedy their lost wages. App. B, 49a-50a. The district court deferred addressing these claims during the pendency of USAPA's appeal to the Ninth Circuit.

The Ninth Circuit did not decide the substantive merits of USAPA's appeal. Instead, in a divided opinion, it found a lack of prudential ripeness and ordered the action dismissed. In so doing, it gave no weight to the "time, effort, and expense" incurred by the parties, the district court or the jury and did not recognize the strong federal policy favoring prompt adjudication of internal union disputes that

affect collective bargaining. App. A, 9a. Notwithstanding that it found a lack of ripeness, the Ninth Circuit cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR,[2] with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." App. A, 12a-13a.

In a well-reasoned dissenting opinion, Judge Bybee argued that the case was ripe:

> Although a CBA would supply tangible evidence of a violation of the DFR, in this case, there is sufficient evidence to consider the West Pilots' complaint without the CBA. The issues are concrete and were well developed in district court proceedings that included a jury trial (for damages) and a bench trial (for equitable relief).

App. A, 24a.

As soon as the Ninth Circuit denied a petition for rehearing *en banc*, USAPA reaffirmed its unwavering commitment to disregard the Nicolau Award and announced its intention to impose a date-of-hire seniority list. A few days later, US Airways filed a declaratory action seeking clarification of its duties and liabilities in regard to this internal union seniority dispute. In that declaratory action, US Airways states three claims that primarily raise these two issues:

---

[2] "DFR" stands for duty of fair representation.

1. If USAPA is in breach of its duty of fair representation, is US Airways liable to Petitioners if it acquiesces to USAPA's demand to disregard the Nicolau Award?

and

2. If USAPA is not in breach of the duty of fair representation, is US Airways liable to USAPA if it refuses to make every reasonable effort to reach agreement on USAPA's demand to disregard the Nicolau Award?

If the answer to both these questions is affirmative, then, unless US Airways knows whether USAPA is in breach of its duty of fair representation, it cannot know what it must do to avoid liability. Hence, the very question that the Ninth Circuit held was unripe when brought by Petitioners is raised by US Airways' declaratory action.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that this Court should grant their petition for a writ of *certiorari* because the Ninth Circuit Court of Appeals wrongly decided an important federal question—the ripeness of an action to enforce compliance with a union seniority arbitration required to fully implement an airline merger. It did so in conflict with federal policy that strongly favors prompt resolution of divisive internal union disputes that affect collective bargaining. It did so in conflict also with *Reed v. United Transportation Union*, 488 U.S. 319 (1989); *Clayton v. Int'l Union, United*

Auto., Aerospace, & Agr. Implement Workers of America, 451 U.S. 679 (1981); and the 2007 McCaskill-Bond Amendment.

I. THE NINTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S RULINGS.

A. The Ninth Circuit disregarded a strong federal interest in prompt resolution of internal union disputes that affect collective bargaining.

Delaying adjudication of Petitioners' claim conflicts with a well-established federal interest in prompt resolution of internal union disputes that "directly relate in any way to collective bargaining or dispute settlement under a collective-bargaining agreement." *Reed*, 488 U.S. at 330; *see also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981) (same). In *Reed*, this Court explained this as an interest in avoiding unfavorable consequences that arise when such disputes are too long left unresolved:

> Internal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly cause a disaffection with the union, thus weakening the union and its ability to bargain for its members. Such prolonged disputes may also distract union officials from their sole purpose — representation of union members in their relations with their employer. These probable effects of protracted disputes may

> be destabilizing to labor-management relations.

488 U.S. at 330.

Petitioners' claim impacts the federal interest addressed in *Reed* because it concerns a divisive internal union dispute that affects collective bargaining. Seniority disputes are by nature divisive because one worker's gain is necessarily another's loss. This dispute is particularly divisive because it involves a dishonored agreement. After agreeing in 2005 that the Nicolau Arbitration would be "final and binding," the East Pilots, and later USAPA, rejected its outcome.[3] App. B, 55a. There is no question, therefore, that this dispute is highly divisive. Petitioners' claim also concerns a dispute that directly affects collective bargaining. Until there is a new collective bargaining agreement ("CBA"), the airline cannot fully merge its operations.[4] The dispute over enforcement of the Nicolau Award prevents reaching such agreement. Petitioners' claim, therefore, implicates the federal interest in prompt adjudication. That interest is

---

[3] An example of the divisiveness of this dispute is described by the district court: "The Nicolau Award caused outrage among many East Pilots. The East Merger Representatives sought to have the award overturned and petitioned ALPA to revisit it. Emotions flared for weeks and months to follow while ALPA attempted to broker a compromise between the two pilot groups." App. B, 42a.

[4] The district court explained: "Because no new CBA is in place, the Airline carries on in a state of separate operations. Efforts toward a new CBA have been complicated by the process of deciding what seniority list the CBA will include." App. B, 39a.

offended by delaying adjudication of Petitioners' claim on the basis of prudential ripeness.

Delaying adjudication of Petitioners' claim also conflicts with the federal interest in prompt resolution of internal union disputes that "challenge the stable relationship between the employer and the union." 488 U.S. at 331 (alteration and quotation marks omitted). Federal courts apply a 6-month limitations to duty of fair representation disputes. *DelCostello v. Teamsters*, 462 U. S. 151, 172 (1983). In *Reed*, this Court explained that courts do so in furtherance of an interest in prompt resolution of such claims. 488 U.S. at 331. This interest is offended when, as happened here, resolution of such claims is delayed on prudential ripeness grounds.

A highly divisive internal union dispute that directly affects collective bargaining or challenges the stable relationship between the carrier and its union must not be left to fester for more than five years. That is far too long. *See Cummings v. John Morrell & Co.*, 36 F.3d 499, 507 (6th Cir. 1994) ("[F]ive or six years is simply too long a time to let a labor dispute fester."). Yet, that is what results from the Ninth Circuit's decision.

B. The federal interest in prompt resolution of internal union disputes that affect collective bargaining is particularly strong where the dispute concerns seniority integration after an airline merger.

Airline-merger related seniority disputes are frequently quite contentious and often involve the courts. *See, e.g., Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992); *Air Wisconsin Pilots Protection Com. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990); *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th 1989). Such judicial involvement is consistent with the federal interest in a stable national transportation system. *Burlington N. R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 450 (1987) (noting, "the major purpose of Congress in passing the RLA[5] [was] [t]o prevent, if possible, wasteful strikes and interruptions of interstate commerce") (alteration and quotation marks omitted). That interest, in turn, strengthens the interest in prompt resolution of disputes that interfere with airline mergers. This logically underlies the 2007 McCaskill-Bond Amendment,[6]

---

[5] "RLA" refers to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

[6] McCaskill-Bond provides that "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger . . . shall apply to the integration of covered employees of the covered air carriers." 121 Stat. 2383, § 117. App. C, 106a. In the event two merging pilot groups cannot agree on how to integrate their seniority list, §§ 3 and 13 provide that an NMB arbitrator would decide

which mandates expedient, final and binding arbitration of seniority disputes arising from airline mergers.

Pursuant to McCaskill-Bond, workers involved in an airline-merger related seniority dispute can compel a "final and binding" arbitration of their dispute using procedures nearly identical to those used in the Nicolau Arbitration. App. D, 110a. Such arbitrations must be held "within 20 days after the controversy arises" and must be decided "within 90 days after the controversy arises." App. D, 109a-110a. This narrow time frame for arbitration reflects a strong federal interest in obtaining an expedient resolution of such disputes.

The federal interests underlying the McCaskill-Bond Amendment demonstrate a heightened federal interest in obtaining prompt resolution of seniority disputes arising from airline mergers. The Ninth Circuit's ruling that delays resolution of Petitioners' claim on prudential ripeness grounds conflicts with that interest.

---

the issue and that "[t]he decision of the arbitrator shall be final and binding on the parties." *Alleghany-Mohawk Merger Case*, 59 C.A.B. 22, 45 (1972) (LPP § 13). App. D, 109a-110a. Although the Nicolau Arbitration was not conducted pursuant to McCaskill-Bond, it was conducted pursuant to the same *Alleghany-Mohawk* Labor Protective Provisions. There is no material basis, therefore, to distinguish the ripeness of a claim to enforce the Nicolau Arbitration, here, from the ripeness of claims to enforce a McCaskill-Bond arbitration.

C. The Ninth Circuit disregarded *Clayton's* admonition that delayed adjudication of an internal union dispute must not merely exhaust an aggrieved worker.

When Congress provides a right in the context of the Railway Labor Act, it implicitly provides a remedy to enforce that right. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944) ("That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."). A remedy, in turn, would be "sacrificed or obliterated" if federal doctrine worked to exhaust aggrieved workers' resources or resolve before they could obtain meaningful relief on a meritorious claim. Where the district court has jurisdiction to provide a remedy, therefore, it should not delay such remedy on prudential grounds if that would only impair workers' ultimate remedy.

Clayton addressed delay in the context of internal union disputes. 451 U.S. at 692. It balanced the hardships of delaying adjudication of such disputes against the general institutional advantages of nonjudicial resolution. *Id. Clayton* admonishes federal courts to not delay adjudication of such disputes unless "internal union procedures are capable of fully resolving meritorious claims short of the judicial forum." *Id.* Delay that can only exhaust an aggrieved workers' resources or resolve is unfair and inconsistent with federal policy.

"[W]here 'the member [may] become exhausted instead of the remedies,' it would be unfair to the employee to insist that internal union remedies be exhausted before going to court." *Frandsen v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 782 F.2d 674, 679 (7th Cir. 1986) (*quoting NLRB v. Marine Workers Local 22*, 391 U.S. 418, 425 (1968)). *See also Clayton* 451 U.S. at 693, n.22 ("Of course exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court, but that result is surely inconsistent with federal policy.").

Clayton explained that, unless delay in favor of internal union procedures can be justified, it merely undermines the policy favoring prompt adjudication:

> As we recently stated, one of the important federal policies underlying § 301, is the " 'relatively rapid disposition of labor disputes.' " This policy is undermined by an exhaustion requirement unless the internal procedures are capable of either reactivating the employee's grievance or of redressing it.

Id. at 693 (citations omitted).

Given that USAPA is constitutionally committed to a date-of-hire seniority list, delay of adjudication by the district court cannot possibly lead to extra-judicial resolution in Petitioners' favor. No matter how meritorious their claim might be, Petitioners will never obtain relief from USAPA. Nothing positive can be gained, therefore,

by delaying adjudication of Petitioners' claim—as directed by the Ninth Circuit—until after "negotiations are complete." App. A, 17a. This delay can do nothing other than exhaust Petitioners' resources and resolve. The dismissal ordered by the Ninth Circuit, therefore, is contrary to federal policy recognized by this Court. Indeed, it sets a bad precedent that will likely encourage similar mischief in future airline mergers.

II. THE NINTH CIRCUIT MISAPPLIED PRUDENTIAL RIPENESS.

A. The duty of fair representation applies at all stages of union representation.

"The duty of fair representation is the *quid pro quo* for the union's right to exclusive representation; it protects employees in the minority from arbitrary discrimination by the majority union." *Laborers & Hod Carriers, Loc. No. 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977). "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft." *Steele*, 323 U.S. at 204. As well as in enforcing contract terms, "[a] union must discharge its duty . . . in bargaining with the employer." *Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry*, 494 U.S. 558, 563 (1990). It logically follows, therefore, that a union can breach the duty of fair representation at all stages of representation, including while it is bargaining with the employer over contract terms.

B. This matter is ripe because the hardships of postponing adjudication are great and there are no corresponding benefits.

Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993). Prudential ripeness "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Prudential ripeness is lacking where a "systemic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Chavez v. Director, OWCP*, 961 F.2d 1409, 1414 (9th Cir. 1992).

A court determining prudential ripeness weighs the hardships of postponing adjudication only where there are "institutional interests that militate in favor of deferral of review." *Consol. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 824 F.2d 1071, 1088-89 (D.C. Cir. 1987) (Edwards, C.J., concurring). If there is no benefit to delaying review, if no institutional interest militates in favor of deferral of review, there is no reason to weigh hardship. There is no such benefit where, as here, there is no internal union procedure to fairly resolve a dispute over seniority.

Prudential ripeness must not be used to deny a person any forum to resolve an important federal

question. Federal courts, for example, apply the closely related abstention doctrines only where an alternative forum exists that can resolve the dispute. *See, e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (recognizing considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation"). Where an alternative forum could provide comprehensive relief, this Court often requires exhaustion of that forum as a prerequisite to ripeness. *E.g.*, *Panetti v. Quarterman*, 551 U.S. 930 (2007) (state habeas); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (state takings).

The question of prudential ripeness, therefore, largely hinges on whether an alternative forum could provide a comprehensive disposition of the legal questions at issue. The answer to the ripeness inquiry, therefore, may depend on how the question at issue is framed. Hence, a court addressing ripeness must focus on "the precise legal question to be answered." *Yahoo! v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1212 (9th Cir. 2006), relying on *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).

The precise legal question to be answered here is whether USAPA is breaching its duty of fair representation by refusing to support the Nicolau Award and by adopting and promoting the East Pilots' date-of-hire seniority scheme. Under the Railway Labor Act, only the district court can resolve this issue. *Czosek v. O'Mara*, 397 U.S. 25,

27-28 (1970) ("[A] suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts."). In other words, there is no alternative forum that might resolve Petitioners' claim if it were dismissed for lack of ripeness. No institutional interest, therefore, militates in favor of postponing adjudication.

Not only does no institutional interest militate in favor of postponing adjudication, but substantial hardships strongly militate against such delay. The Ninth Circuit correctly noted that "considerable time, effort, and expense have been devoted to the merits of Plaintiffs' [duty of fair representation] claim before both this Court and the district court." App. A, 9a. Wasting that time, effort and expense is surely a burdensome hardship. This must be considered and given substantial weight. On balance, therefore, this action is ripe.

CONCLUSION

This petition for a writ of *certiorari* should be granted so that the Court can address the ripeness of claims to enforce arbitrated integrations of seniority lists.

Respectfully submitted,

Marty Harper
MHarper@polsinelli.com
Counsel of Record
Kelly J. Flood
KFlood@polsinelli.com
Andrew S. Jacob
AJacob@polsinelli.com
Katherine V. Brown
KVBrown@polsinalli.com
POLSINELLI SHUGHART, P.C.
One East Washington Street,
Suite 1200
Phoenix, AZ 85004-2568
(602) 650-2000
Counsel for Petitioners

APPENDIX

APPENDIX

Appendix A: Ninth Circuit opinion, dated June 4, 2010 ..... 1a

Appendix B: District Court order, dated July 17, 2009. ..... 34a

Appendix C: McCaskill-Bond Amendment, 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007) 106a

Appendix D: Allegheny-Mohawk Labor Protective Provisions, §§ 3, 13 ..... 109a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Don ADDINGTON, individual resident of the State of Arizona formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.; John Bostic, individual resident of the State of Arizona formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.; Mark Burman, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.; Afshin Iranpour, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.; Roger Velez, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.; Steve Wargocki, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, U.S. Airways, Inc.,

Plaintiffs-Appellees,

-v.-

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of U.S. Airways Inc., a Delaware corporation,

Defendant-Appellant,

-and-

US Airways, Inc., a Delaware corporation; Stephan Bradford; Robert Davison; Douglas L. Mowery,

Defendants.

No. 09-16564.

Argued and Submitted Dec. 8, 2009.

Filed June 4, 2010.

Background: Airline pilots brought action against newly-certified union, alleging that union breached its duty of fair representation by negotiating contract that favored certain pilots over others in merging of seniority lists of two merged airlines. After jury found in favor of pilots on issue of breach, the United States District Court for the District of Arizona, Neil V. Wake, District Judge, 2009 WL 2169164, following bench trial on remaining issues, granted pilots' request for injunction. Union appealed.

Holding: The Court of Appeals, Tashima, Circuit Judge, held that, as a matter of first impression, action was not ripe.

Remanded.

Bybee, Circuit Judge, dissented and filed opinion.

Andrew S. Jacob, Polsinelli Shughart, PC, Phoenix, AZ, for the plaintiffs-appellees.

Lee Seham, Nicholas Paul Granath, Lucas Middlebrook and Stanley Silverstone, Seham, Seham, Meltz & Petersen, LLP, White Plains, NY, for the defendant-appellant.

Appeal from the United States District Court for the District of Arizona, Neil V. Wake, District Judge, Presiding. DC No. CV 08-1633 NVW.

Before A. WALLACE TASHIMA, SUSAN P. GRABER, and JAY S. BYBEE, CIRCUIT Judges.

Opinion by Judge TASHIMA; Dissent by Judge BYBEE.

TASHIMA, Circuit Judge:

This case arose out of a bitter seniority dispute precipitated by the merger of U.S. Airways, Inc., and America West Air-lines ("AWA"). Following the merger, the companies' respective seniority lists had to be integrated to create a single list for the merged airline. The U.S. Airways, Inc., pilots ("East Pilots") and the AWA pilots ("West Pilots"), who were both represented by the Air Line Pilots Association ("ALPA"), began exploring methods of

integration pursuant to ALPA's policy regarding mergers. The East Pilots generally had been hired earlier and favored a strict date-of-hire system, while the West Pilots sought a seniority system that would take into consideration the relative pre-merger strength of their airline over U.S. Airways, Inc. Ultimately, the union submitted the internal dispute to arbitration.

Although it is common for a merger to raise the issue of integrating seniority lists, this case contains an added wrinkle. The East Pilots, who were dissatisfied with the seniority integration proposal ALPA arrived at through the union's internal arbitration, led a successful effort to decertify ALPA and replace it with a new union, U.S. Airline Pilots Association ("USAPA"). Headed by an East Pilot, USAPA was constitutionally committed to pursuing date-of-hire principles, in contrast to ALPA, whose merger policy committed it to pursuing the arbitrated seniority list.

Certain West Pilots brought this action against the newly-certified union alleging that USAPA breached its duty of fair representation ("DFR") by negotiating a contract that would impermissibly favor the East Pilots at the expense of the West Pilots. A jury found that the union had breached its DFR, and the district court, after a bench trial on the remaining equitable issues, granted the West Pilot Plaintiffs an injunction against USAPA. *Addington v. U.S. Airline Pilots Ass'n,* 2009 WL 2169164 (D.Ariz. July 17, 2009). USAPA contends, *inter alia,* that the district court never had jurisdiction because the West Pilots' claim is not ripe. We agree.

BACKGROUND

In 2005, U.S. Airways, Inc., and AWA merged to form a single carrier called U.S. Airways (or the "airline"). At the time of the merger, ALPA was the collective bargaining representative for both the East Pilots and the West Pilots. Each group had a separate collective bargaining agreement ("CBA") which was administered by each group's Master Executive Council. As with most mergers, an integrated seniority list had to be created. The East Pilots were the bigger group-about 5,100, compared to about 1,900 West Pilots-and were generally hired before the West Pilots. The West Pilots received more favorable wages under their CBA and, unlike the East Pilots, no West Pilots were furloughed at the time of the merger.

The two merging airlines and ALPA entered into a Transition Agreement ("TA"), which incorporated by reference ALPA's Merger Policy. Under the TA, the carriers agreed not to object to ALPA's seniority integration proposal, provided it did not result in certain additional costs. The seniority integration proposal could be implemented only as part of a single CBA. The single CBA would require approval by the East Master Executive Council, the West Master Executive Council, and a majority of each of the East and West pilot groups, effectively giving each side a veto. Until the single CBA was negotiated, with few exceptions, the TA placed a "fence" between East and West operations, such that each would continue to operate under its respective CBA.

Pursuant to the ALPA Merger Policy, the two pilot groups began negotiating seniority integration, but to no avail. Under the union's Merger Policy, if negotiation and mediation between the two sides fail, the issue is submitted to "final and binding" arbitration. The merged seniority list is then presented to the airline, and ALPA is to "use all reasonable means at its disposal to compel the company to accept and implement the merged seniority list." The arbitrated list is not subject to a separate ratification vote, but becomes part of the single CBA, which is subject to member ratification.

George Nicolau was selected to chair the arbitration panel, pursuant to the Merger Policy. Arbitration commenced between "the U.S. Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." In early May 2007, the panel issued its award (the "Nicolau Award"). A majority of East Pilots "strenuously objected" to the Nicolau Award and opposed its implementation. The East Pilot representatives sought to have ALPA prevent implementation of the Nicolau Award. ALPA unsuccessfully attempted to get the two sides to reach a compromise.

While the arbitration was pending, negotiations with the airline progressed, and the airline proposed a comprehensive CBA in May 2007. In late July 2007, the East Master Executive Council determined that the East Pilots would never ratify a CBA that incorporated the Nicolau Award. On August 15, 2007, the East Pilots withdrew their representatives from the committee negotiating the new CBA with the airline, halting those negotiations. In late 2007, ALPA submitted the Nicolau

Award to the airline, which accepted the award on December 20, 2007.

In the meantime, several East Pilots began exploring the possibility of forming a new union that would not implement the Nicolau Award. They formed USAPA and, on November 29, 2007, the National Mediation Board certified a representation election. USAPA won the election and was certified as the collective bargaining representative for the entire group of pilots, East and West, on April 18, 2008. From the date the East Pilots withdrew from negotiations until ALPA was decertified, there were no further negotiations with the airline.

USAPA adopted a constitution that established an "objective" of "maintain[ing] uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's unmerged career expectations." Under USAPA's constitution, ratification requires a majority vote of the entire union membership, such that each pilot group no longer has its own veto power.

Five months after certification, USAPA presented a seniority proposal to the airline. The proposal incorporated date-of-hire principles. Although the proposal contained some protections for West Pilots, it was not nearly as favorable to West Pilots as the Nicolau Award. The airline had not yet responded to the proposal when the district court entered its permanent injunction.

The airline has been forced to reduce flying because of economic considerations. The reductions have

mostly hit the western operations. Because of the continuing separate operations, approximately 175 of the 300 furloughs the airline had announced by the time of trial were West Pilots. At the time of trial, 140 West Pilots had been furloughed. Under a single CBA incorporating the Nicolau Award, none of the West Pilots would have been furloughed.

Six individual West Pilot-Plaintiffs ("Plaintiffs") filed this hybrid action against USAPA and U.S. Airways, seeking damages and injunctive relief. The district court dismissed the claims against the airline because the System Board of Adjustment had exclusive jurisdiction over them. *Addington v. U.S. Airlines Pilots Ass'n,* 588 F.Supp.2d 1051, 1064 (D.Ariz.2008). Plaintiffs amended their complaint in the surviving DFR action, specifying that the claim was brought on behalf of similarly situated West Pilots. The district court certified a class of West Pilots and set a bifurcated trial schedule. After a jury trial on liability, the jury found that USAPA had violated the DFR because it abandoned the Nicolau Award in favor of a date-of-hire list solely to benefit the East Pilots at the expense of the West Pilots.

After a bench trial on remedy, the district court ordered injunctive relief, permanently enjoining and ordering USAPA to (1) "Immediately, and in good faith, make all reasonable efforts to negotiate and implement a single [CBA] with U.S. Airways that will implement the Nicolau Award seniority proposal ..."; (2) "Make all reasonable efforts to support and defend the seniority rights provided by or arising from the Nicolau Award in negotiations with U.S. Airways"; and (3) "Not negotiate for separate

[CBAs] for the separate pilot groups...." The district court denied USAPA's post-trial motions for judgment as a matter of law and for a new trial. USAPA timely appealed, and this court granted USAPA's unopposed motion to expedite this appeal.

DISCUSSION

Although considerable time, effort, and expense have been devoted to the merits of Plaintiffs' DFR claim before both this Court and the district court, we are without jurisdiction to address the merits of the claim unless it is ripe. *See S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir.1990). We review ripeness *de novo*. *See Manufactured Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir.2005); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1084 (9th Cir.2003). If the claim before us is not ripe, we must dismiss. *See S. Pac. Transp.*, 922 F.2d at 502.

No published case has expressly addressed when a DFR claim based on a union's negotiation of a CBA becomes ripe. Thus, we apply the general principles underlying the ripeness doctrine and take guidance from our decisions regarding the related issue of when a DFR claim accrues for statute of limitations purposes in the context of the administration of a CBA. We conclude that Plaintiffs' DFR claim is not yet ripe.

The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide only cases and controversies and in part on prudential concerns. *See Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir.2009), *cert. denied*, --- U.S. ----,

130 S.Ct. 1139, --- L.Ed.2d ---- (2010); *W. Oil & Gas Ass'n v. Sonoma County,* 905 F.2d 1287, 1290 (9th Cir.1990). The ripeness inquiry is "intended to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *Maldonado,* 556 F.3d at 1044 (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). To determine whether a case is ripe, "we consider two factors: 'the fitness of the issues for judicial decision,' and 'the hardship to the parties of withholding court consideration.' " *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 433 F.3d 1199, 1211-12 (9th Cir.2006) (en banc) (per curiam) (quoting *Abbott Labs.,* 387 U.S. at 149, 87 S.Ct. 1507). Both factors militate in favor of finding this claim premature.

A question is fit for decision when it can be decided without considering "contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Cardenas v. Anzai,* 311 F.3d 929, 934 (9th Cir.2002) (internal quotation marks omitted); *see also United States v. Streich,* 560 F.3d 926, 931 (9th Cir.), *cert. denied,* --- U.S. ----, 130 S.Ct. 320, 175 L.Ed.2d 211 (2009). "At the same time, a litigant need not 'await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough.' " *Id.* (quoting *18 Unnamed "John Smith" Prisoners v. Meese,* 871 F.2d 881, 883 (9th Cir.1989) (emphasis in *Streich*)).

We conclude that this case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying injury. At this point, neither the West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA. Likewise, it is not certain whether that proposal will be ratified by the USAPA membership as part of a new, single CBA. Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal-whatever USAPA's final proposal ultimately is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision.

We also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots. "To meet the hardship requirement, a litigant must show that withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss." *Winter v. Cal. Med. Review Bd., Inc.*, 900 F.2d 1322, 1325 (9th Cir.1990) (citing *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-34 (9th Cir.1987)); *see also Am. Trucking Ass'ns v. ICC*, 747 F.2d 787, 790 (D.C.Cir.1984) (finding no hardship where the policy statement the plaintiffs challenged "neither impose[d] any obligation upon [the plaintiffs], nor in any other respect ha[d] any impact upon them 'felt immediately ... in conducting their day-to-day affairs' " (quoting *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967))).

Plaintiffs correctly note that certain West Pilots have been furloughed, whereas they would still be working under a single CBA implementing the Nicolau Award. It is, however, at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership. ALPA had been unable to broker a compromise between the two pilot groups, and the East Pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated. That the court cannot fashion a remedy that will alleviate Plaintiffs' harm suggests that the case is not ripe.[FN1]

> FN1. The dissent asserts that "nothing would be gained by postponing a decision, and the parties' interest would be well served by a prompt resolution of the West Pilots' claim." Diss. op. at 8017 (internal alterations, quotation marks, and citation omitted). To be sure, the parties' interest would be served by prompt resolution of *the seniority dispute*, but that is not the same as prompt resolution of the DFR claim. The present impasse, in fact, could well be prolonged by prematurely resolving the West Pilots' claim judicially at this point. Forced to bargain for the Nicolau Award, any contract USAPA could negotiate would undoubtedly be rejected by its membership. By deferring judicial intervention, we leave USAPA to bargain in good faith pursuant to its DFR, with the interests of all members-both East

> and West-in mind, under pain of an unquestionably ripe DFR suit, once a contract is ratified.

Plaintiffs seek to escape this conclusion by framing their harm as the lost opportunity to have a CBA implementing the Nicolau Award put to a ratification vote. Because merely putting a CBA effectuating the Nicolau Award to a ratification vote will not itself alleviate the West Pilots furloughs, Plaintiffs have not identified a sufficiently concrete injury.[FN2] Additionally, USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award.[FN3]

> FN2. Plaintiffs' alleged hardship cannot instead be premised on any delay caused by USAPA in reaching a single CBA. As the district court noted, Plaintiffs abandoned their claim that USAPA is intentionally delaying negotiation of a CBA. *Addington*, 2009 WL 2169164, at *22 ("During discovery, Plaintiffs retreated from any notion of deliberate delay on the part of USAPA."). The dissent's assertion that "the absence of a CBA is itself powerful evidence of a DFR violation," Diss. op. at 1184, is therefore misplaced. Although absence of a CBA might be evidence of a DFR violation, if the violation were based on deliberate delay by the union, it is not evidence of a union's improper preference of one seniority system over another. As demonstrated by ALPA's similar difficulties in reaching a CBA, the pilot groups, and individual pilots with their ratification/non-

ratification powers, are the major contributors to the absence of a CBA in these circumstances.

FN3. We do not address the thorny question of the extent to which the Nicolau Award is binding on USAPA. We note, as the district court recognized, that USAPA is at least as free to abandon the Nicolau Award as was its predecessor, ALPA. The dissent appears implicitly to assume that the Nicolau Award, the product of the internal rules and processes of ALPA, is binding on USAPA. *See* Diss op. at 1187-88.

Although we do not hold that a DFR claim based on a union's promotion of a policy is never ripe until that policy is effectuated, we conclude that, in this case, there is too much uncertainty standing in the way of effectuation of Plaintiffs' harm to warrant judicial intervention at this stage. *Cf. Sergeant v. Inlandboatmen's Union of the Pac.*, 346 F.3d 1196, 1200 (9th Cir.2003) (examining Labor Management Reporting and Disclosure Act issue "in light of the well-established federal policy of avoiding unnecessary interference in the internal affairs of unions and according considerable deference to the interpretation and application of a union's rules and regulations").[FN4]

FN4. The dissent agrees with "the general rule that we evaluate the duty of fair representation based on the fairness of the actual representation as memorialized in the [CBA,]" but would hold that this "is an unusual case and ... an exception" to that rule.

> Diss. op. at 1184. As much as the dissent stresses the case-specific nature of our inquiry, however, there is no disputing that this case would be the first time we allowed a DFR suit to proceed in a collective bargaining/ contract negotiating context before the CBA at issue was ratified. Such a departure from the norm would invite parties to bring suit long before internal disputes have had a chance to work themselves out. It would also force us in each case to decide-without the benefit of hindsight that is enjoyed in statute-of limitations accrual cases-whether a union's position is a mere announcement of a bargaining position or the adoption of a permanent change in position. Although the dissent believes that it is an easy question in this case, it will not always be so.

Our conclusion that Plaintiffs' claim is not ripe is consistent with our DFR decisions, which have found DFR violations based on contract negotiation only after a contract has been agreed upon.[FN5] *See, e.g., Williams v. Pac. Mar. Ass'n,* 617 F.2d 1321, 1328, 1330 (9th Cir.1980) (involving suit for breach of DFR in negotiating CBA brought after rules at issue were adopted); *Bernard v. Air Line Pilots Ass'n,* 873 F.2d 213, 215 (9th Cir.1989) (involving suit for breach of DFR during negotiations brought after agreement between union and employer was reached); *Hendricks v. Airline Pilots Ass'n,* 696 F.2d 673, 674-75 (9th Cir.1983) (same).

> FN5. Plaintiffs have identified only one case in which a court allowed a DFR suit to proceed before a contract had been executed. *See*

> *Mount v. Grand Int'l Bhd. of Locomotive Eng'rs*, 226 F.2d 604, 608 (6th Cir.1955). In *Mount*, the union notified employees that it would negotiate a contract amendment in direct opposition to a series of rulings that had been made pursuant to the union's internal policies. *Id.* at 605-06. The Sixth Circuit held that the fact that the proposed contract had not been executed did not make the plaintiff's DFR action premature. *Id.* at 608. *Mount*, however, contained only a cursory analysis of the ripeness issue, and we are not persuaded to apply its conclusion to this case. More recent cases have held that a claim does not accrue when the union merely announces its intention to breach its DFR in the future. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 279 (2d Cir.2004) ("[W]e do not require, or even permit, union members to bring a suit against their union simply because the union has announced its future intention to break its duty."); *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 615-16 (1st Cir.1987) ("Knowledge of a party's predisposition to commit an unfair labor practice or suspicion that, when the moment is opportune, the knife thrust will follow, is not enough to galvanize § 10(b). The statute begins to run only when the impermissible act or omission-the unfair labor practice-actually takes place.").

Indeed, the Supreme Court case that clarified that the DFR was applicable during contract negotiations articulated its holding in terms that imply a

claim can be brought only after negotiations are complete and a "final product" has been reached. *See Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) ("[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.' " (quoting *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953))).

Notably, even in the cases on which Plaintiffs rely most heavily, the policy that the plaintiffs claimed injured them had already been effectuated when the plaintiffs brought the claim. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers,* 378 F.3d 269, 275-76 (2d Cir.2004) (noting that airline had *accepted* union's seniority system and the plaintiffs had been furloughed as a result); *Teamsters Local Union No. 42 v. NLRB,* 825 F.2d 608, 611 (1st Cir.1987) (noting that shifts had been *assigned* according to union's seniority system). Although both the *Ramey* court and *Teamsters* court concluded the claim accrued (for statute of limitations purposes) before effectuation of the policy at issue, *see Ramey,* 378 F.3d at 279-80 (holding that claim accrued when union advocated seniority position to employer during contract negotiations); *Teamsters,* 825 F.2d at 614-15 (holding that claim accrued when union announced to the plaintiffs that they had been assigned to less desirable shift, even though negotiations with employer regarding the seniority system that would dictate shift assignments occurred two months later), the holdings are not as easily applied in our situation as plain-

tiffs urge.[FN6] In both *Ramey* and *Teamsters*, the unions argued that the plaintiffs' claims had accrued more than six months prior to filing, such that the cases were barred by the statute of limitations. *Ramey*, 378 F.3d at 276; *Teamsters*, 825 F.2d at 614. In addressing whether the cases were time-barred, each court was faced with the issue whether the claim accrued when the union announced its *intention* to take a negotiating position that would amount to a DFR breach (a date that fell outside the six-month period) or when the union actually advocated that position to the employer during negotiations (a date that fell within the six-month period). *Ramey*, 378 F.3d at 278-80; *Teamsters*, 825 F.2d at 614-15. The court in each case found that the claim accrued at the later date. *Ramey*, 378 F.3d at 279-80; *Teamsters*, 825 F.2d at 614-15. Significantly, however, because the date the union advocated its position in negotiations fell within the six-month period in both cases, there would have been no need for the plaintiffs to argue that the claim did not accrue until effectuation of the policy. Moreover, because the seniority systems at issue already had been effectuated in both cases, the courts simply were not faced with the possibility of interfering in a union's internal conflict before the conflict manifested as concrete injury to the plaintiffs.

> FN6. Indeed, we are hesitant to transplant a rule from cases analyzing claim accrual for statute of limitations purposes to the ripeness context. Although we have noted the relationship between the statute of limitations and ripeness inquiries, *see Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th

> Cir.1993) ("Determining when the cause of action accrues is merely the corollary to the ripeness inquiry."), there are key differences in the posture of a case that presents a statute of limitations issue and one that presents a ripeness issue. In a statute of limitations case, unlike a ripeness case, the injury has unquestionably culminated, and the issue is whether the plaintiffs learned or should have learned of the injury so long ago that it would no longer be fair to bring the suit. In deciding these cases, courts often decline to identify a specific date on which the claim accrued, instead identifying the "earliest" or "latest" date it could have accrued, depending on whether the court determines the claim to have fallen inside or outside the applicable statute of limitations. *See, e.g., Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1106 (2d Cir.1991) (concluding that claim was time-barred because it accrued "at the latest" on the date the union ratified the allegedly violative agreement, which was more than six months before filing).

We also note in these cases the apparent absence of contingencies that stood between the union's advocating to the employer a position on a certain policy and the implementation of that policy. Neither *Ramey* nor *Teamsters* references a ratification requirement, and in both cases the employer seemed predisposed to follow the union's proposal. In *Teamsters,* the court found accrual at the date the union communicated its adverse action to the employees. 825 F.2d at 614-15. Although the negotia-

tions that would result in that adverse action had not yet been completed, the announcement was definitive. *Id.* In *Ramey*, the underlying district court decision indicates that the employer had already agreed to accept whatever seniority system the union proposed. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 2002 WL 32152292, at *4 (E.D.N.Y. Nov.4, 2002) (noting that the transition agreement in effect gave the union "complete control over the issue of seniority"). Because of these distinctions, we are not convinced that these cases, even if they were binding on us, would require a finding of ripeness in the circumstances of the case at bench.[FN7]

> FN7. Plaintiffs correctly note that *Ramey* suggests a DFR claim can accrue before implementation of the policy at issue. Analogizing to anticipatory repudiation in a breach of contract case, the *Ramey* court noted that it would be possible-but not required-for a claim to be brought when a union unequivocally communicates its intention to breach its DFR, but that for statute of limitations purposes, the claim did not accrue until "the date on which performance was due, namely the date on which [the union] advocated a position on the seniority issue to [the employer]." 378 F.3d at 279-80. The court went on, however, to qualify its holding, recognizing the requirement of likelihood of harm:
>
> > Because we hold that [the union] has not met its burden to demonstrate that plaintiffs reasonably should have known that the breach occurred before January 28,

> 1999 [the date six months before filing date], we do not address the difficult and unsettled question of how certain it must be that harm will be caused by a union's breach in order to trigger the statute of limitations. We have held that the statute of limitations is triggered even if it is not absolutely certain that a union member will be harmed by a breach. However, we note that there must be *some* likelihood that a harm will result from a union's breach before a member may file suit. Otherwise, such claims would be unduly speculative. We caution district courts to consider this issue in the future when faced with a suit brought after a union breaches but before tangible harm is caused.

Id. at 280 n. 5 (citations omitted).

Finally, we find instructive our cases analyzing accrual of DFR claims that are based on a union's alleged errors outside the contract negotiation process.[FN8] In the grievance context, too, we have required that a final outcome be reached before allowing a suit based on a union's allegedly violative conduct that led to the decision. *See Kozy v. Wings W. Airlines, Inc.*, 89 F.3d 635 (9th Cir.1996). In *Kozy*, an employee brought a DFR claim alleging the union committed errors while representing him in a grievance hearing before an arbitrator. *Id.* at 638. We held that the claim had not accrued until the arbitrator's written decision was issued. *Id.* at 639. We noted that

> FN8. The DFR applies both to contract negotiation and contract administration. *See O'Neill,* 499 U.S. at 67, 111 S.Ct. 1127.

> "There was, at one time, some indication in this Circuit that the employee 'should know' of his Union's errors in representing him at a hearing when he saw the errors committed during the hearing, and that the six-month [statute of limitations] period began to run from that date even if the grievance board had not yet rendered its final decision."

Id. at 640 (citing *Galindo v. Stoody Co.,* 793 F.2d 1502, 1509 (9th Cir.1986)). However, we stated, *Galindo* resolved that confusion, holding that a claim accrues for statute of limitations purposes only when the employee learns of the arbitrator's award. *Kozy,* 89 F.3d at 640 (citing *Galindo,* 793 F.2d at 1509). The holding in *Galindo* "recognize[d] that the arbitrator's final decision could make the employee whole despite the union's errors, and that the arbitrator could change his mind at any time prior to issuing a final and binding decision." *Kozy,* 89 F.3d at 640 (citing *Galindo,* 793 F.2d at 1509). Similarly, in the context of negotiations toward a CBA, the parties could shift positions until negotiations are complete, and the final agreement could be acceptable to Plaintiffs.

CONCLUSION

For the foregoing reasons, we hold that Plaintiffs' DFR claim is not ripe; therefore, the case is **RE-**

MANDED to the district court with directions that the action be **DISMISSED.** No costs to either side.

BYBEE, Circuit Judge, dissenting:

I agree with much of the majority opinion. I concur that, in general, we should not decide duty of fair representation ("DFR") challenges until "after a contract has been agreed upon." Maj. Op. at 1181. In the typical case, the contract will be the best evidence of fair representation or lack thereof. In my view, however, the contract is not the *sine qua non* of unfair representation, and the fact that a case could be more ripe-in the sense that the issues could be more concrete, more focused-is not evidence of the contrary proposition that the case is *not* ripe.

This is an unusual case and, in my view, an exception to the general rule that we evaluate the duty of fair representation based on the fairness of the actual representation as memorialized in the Collective Bargaining Agreement ("CBA"). Here, the absence of a CBA is itself powerful evidence of a DFR violation. As set forth quite fairly in the majority opinion and in a lengthy and careful opinion by the district court, the Air Line Pilots Association ("ALPA") was decertified and a new union, the U.S. Airline Pilots Association ("USAPA"), certified precisely to frustrate implementation of the Nicolau Agreement and to negotiate a CBA with U.S. Airways that favors the East Pilots. As the district court found, "USAPA's sole objective in adopting and presenting its seniority proposal to the Airline was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining union

as a whole." Thus, "the terms of USAPA's seniority proposal are substantially less favorable to West Pilots than the Nicolau Award" made through binding arbitration, an award that "USAPA concedes that it will never bargain for." It has been nearly five years since the two airlines merged, and the pilots are further from, not closer to, a CBA that reflects the interests of both pilot groups. Although a CBA would supply tangible evidence of a violation of the DFR, in this case, there is sufficient evidence to consider the West Pilots' complaint without the CBA. The issues are concrete and were well developed in district court proceedings that included a jury trial (for damages) and a bench trial (for equitable relief). I would hold the case is ripe for decision and decide the appeal on the merits.

I

The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). "Constitutional ripeness, in many cases, 'coincides squarely with standing's injury in fact prong' and 'can be characterized as standing on a timeline.' " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir.2009) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir.2000)). Ripeness is a case-specific inquiry and does not lend itself to broad, bright-line rules based on the type of claim asserted. In *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir.2006) (en banc), we wrote that "[i]t is [ ]

important to a ripeness analysis that we specify the precise legal question to be answered. Depending on the legal question, the case may be ripe or unripe. If we ask the wrong legal question, we risk getting the wrong answer to the ripeness question."

A

Getting the legal question right is critical. Two related cases from the Supreme Court are particularly instructive here. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court held that a plaintiff's challenges to the constitutionality of an arbitration and compensation scheme in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") would not become ripe until the "[Environmental Protection Agency] ha [d] considered data submitted by[the plaintiff] in evaluating another application and an arbitrator ha[d] made an award...." *Id.* at 1020, 104 S.Ct. 2862. The very next term, however, in *Thomas v. Union Carbide Agricultural Products Co.*, the Court held that a similar constitutional challenge to FIFRA's arbitration provisions was ripe even though *none* of the thirteen plaintiffs was actually challenging an arbitration award. 473 U.S. at 579-82, 105 S.Ct. 3325. Only one plaintiff-Stauffer Chemical Company-had engaged in arbitration, and it sought to enforce the award. None of the twelve other plaintiffs had actually engaged in an arbitration under FIFRA, but they alleged that they were "aggrieved by the *threat* of an unconstitutional arbitration procedure." *Id.* at 579, 105 S.Ct. 3325. The Court did not dismiss *any* plaintiff's claims on ripeness grounds: "One does not have to await the consummation of threatened in-

jury to obtain preventive relief. If the injury is certainly impending, that is enough. *Nothing would be gained by postponing a decision,* and the public interest would be well served by a prompt resolution of the constitutionality of FIFRA's arbitration scheme." *Id.* at 581-82, 105 S.Ct. 3325 (quotation marks and citations omitted) (emphasis added).

What our decision in *Yahoo!* and the Court's decisions in *Monsanto* and *Thomas* make clear is that ripeness is a contextual and commonsense doctrine. If the unique circumstances of a particular claim render it fit for decision, the claim is ripe. I submit that this is a case in which "[n]othing would be gained by postponing a decision, and the [parties'] interest[s] would be well served by a prompt resolution of" the West Pilots' DFR claim. *Id.* at 582, 105 S.Ct. 3325.

B

"[A] union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998). "The duty ... is the quid pro quo for the union's right to exclusive representation; it protects employees in the minority from arbitrary discrimination by the majority union." *Laborers & Hod Carriers, Local No. 341 v. N.L.R.B.*, 564 F.2d 834, 839-40 (9th Cir.1977).

The majority describes three DFR cases from this circuit- *Williams v. Pacific Maritime Association*, 617 F.2d 1321 (9th Cir.1980), *Bernard v. Air Line*

Pilots Association, 873 F.2d 213 (9th Cir.1989), and *Hendricks v. Airline Pilots Association,* 696 F.2d 673 (9th Cir.1983)-as "f[inding] DFR violations based on contract negotiation only after a contract has been agreed upon," Maj. Op. at 1181. These cases are not only distinguishable, but completely inapposite. First, none of these cases even mentions ripeness. Together, *Williams, Bernard,* and *Hendricks* stand for the uncontroversial proposition that a DFR claim *can* be brought after a CBA or finalized seniority integration agreement has been completed. The issue here, however, is whether a DFR claim *must* be brought after a CBA or finalized seniority integration agreement, which none of our cases cited by the majority even purports to address.

Just as importantly, none of these cases addressed the "precise legal question" advanced by the West Pilots. In *Williams,* "[t]he heart of the employees' claim of unfair representation [wa]s that the union breached its statutory duty to plaintiffs *by agreeing to the adoption of* [certain] standards for deregistration." 617 F.2d at 1328 (emphasis added). In *Bernard,* the factual situation was basically a mirror image of this case: the merger of Alaska Air Group and Jet America became effective on October 1, 1987, and a seniority integration agreement was completed less than a week later, on October 6, 1987. 873 F.2d at 215. The plaintiffs in *Bernard* sued immediately thereafter and were quickly granted preliminary injunctive relief, which we upheld. *Id.* at 215, 219. Here, the West Pilots claim to be aggrieved by the *failure* to pursue the memorialization of an arbitration award in a finalized seniority integration agreement, while in *Bernard* the

claim was the opposite: an agreement was memorialized almost immediately, without taking into account a preexisting merger policy. Finally, in *Hendricks,* plaintiffs argued that "the union[ ] breached its duty of fair representation because [*a contract*] *amendment* was arbitrary and discriminatory." 696 F.2d at 677 (emphasis added). Like the theory in *Williams,* the plaintiffs' theory in *Hendricks* actually challenged a memorialized agreement and was therefore not the "precise" legal theory advanced here.

The majority also cites *Air Line Pilots Association v. O'Neill,* 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) (" *ALPA* "), for the proposition that "a claim can only be brought once negotiations are complete and a 'final product' has been reached." Maj. Op. at 1182. With all due respect, this overstates what *ALPA* said. *ALPA* said nothing about the ripeness doctrine. What the Court said was that "[a]ny substantive examination of a union's performance ... must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty...." 499 U.S. at 78, 111 S.Ct. 1127 (internal citations omitted). The Court's statement in *ALPA* only confirms what we already know: a CBA may be the best evidence of satisfaction of or violation of the DFR. But the Court's equivocal "*may* constitute evidence" falls well short of confirming that "a claim can *only* be brought" once there is a CBA.

None of these cases are relevant with respect to the ripeness issue here. They stand for the noncontroversial proposition that a DFR claim can be brought after a CBA has been completed. By contrast, the issue here is whether a DFR claim can be brought *prior* to the completion of a CBA.

II

I agree with the majority that this case would be ripe if USAPA and U.S. Air had entered into a CBA. That is not the question that this case presents. We are asked whether our Article III jurisdiction extends to a DFR claim based on a union "constitutionally committed," Maj. Op. at 1177, to voiding a binding arbitration award and adopting a "date of hire" seniority principle that plainly favors one side of a merger. When the question is posed in this way, I believe the ripeness of the West Pilots' claims becomes clear.

We employ a two-part test to determine whether a claim is ripe for review, evaluating "(1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if we decline to consider the issues." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir.1996). The issues raised by the West Pilots' DFR claim are straightforward, and the uncontested facts of this case make clear that the issues involved are fit for decision on this record.

The West Pilots' DFR theory does not depend on any contingent future events such as the memorialization of a finalized CBA or seniority integration agreement. The district court explained why the

issues were fit for decision and the parties will suffer hardship if we decline to consider the issues:

> The issues fit for decision are these: Whether USAPA adopted and presented its seniority proposal without any legitimate union objective, solely to benefit East Pilots at the expense of West Pilots, and if so whether the West Pilots are entitled to damages and an injunction therefore.... USAPA concedes it will never bargain for implementation of the Nicolau Award. It is constitutionally hostile to doing so. The Airline has accepted the Nicolau Award, expressing no opposition to it, and the union has failed to show any legitimate reason (or plausible future reason) for abandoning it. Liability flows from the process and aims of USAPA's seniority position. *The outcome of negotiations is irrelevant. Without an injunction, USAPA's seniority position inevitably impairs the collective bargaining process.*
>
> For this same reason, denying judicial review would work a substantial hardship upon the parties, including the Airline.... In addition to depriving the West Pilots of legitimate representation, USAPA's bargaining position leaves the Airline to decide between a lack of a single CBA and an unlawful single CBA.

(Emphasis added).

I agree with the district court that, given the "precise legal question" raised by the West Pilots, this case is "fit for decision." As the district court correctly observed, given the constitutional commitment of USAPA to date-of-hire principles-principles irreconcilably opposed to the compromise embodied in the Nicolau Award-"the outcome of negotiations is irrelevant." As a result, the question presented in this case does not pivot on any " 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.' " Maj. Op. at 1179 (quoting *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir.2002)). The West Pilots' claimed "injury is *certainly* impending, [and] that is enough." *United States v. Streich*, 560 F.3d 926, 931 (9th Cir.2009) (quotation marks omitted). Instead, as the district court found, "USAPA has misled the majority about its power to improve their seniority prospects at the expense of the West Pilots. The will of the East Pilots springs from a mistaken understanding of the law and mismanaged expectations. *If this is an impasse, it is one USAPA has goaded on.*" (Emphasis added). The impasse is not evidence of the lack of ripeness of the West Pilots' claims. It is Exhibit A in their case-it is itself evidence of USAPA's intractability on behalf of the East Pilots. Again, as the district court found, "USAPA has made plain its intent never to bargain for the Nicolau Award," and time appears to be on the side of the East Pilots.[FN1] Under these circumstances, the West Pilots need not "await the consummation of threatened injury to obtain preventive relief." *Id.* (quotation marks omitted).

FN1. Although the West Pilots are not claiming that USAPA has "deliberately" delayed

> completing a CBA, Maj. Op. at 1180-81 n. 2, the majority notes that West Pilots have been furloughed and that they would not have been furloughed under the Nicolau Award, *id.* at 1180.

When the East Pilots campaigned to decertify ALPA and replace it with USAPA, a new union constitutionally committed to pursuing date-of-hire principles, a DFR claim by the West Pilots would not have been ripe. As the Second Circuit explained in *Ramey v. District 141 International Association of Machinists and Aerospace Workers,* 378 F.3d 269 (2d Cir.2004), "a breach [of the duty of fair representation does not] occur[ ] when a union announces an *intention,* even if it does so unequivocally, to advocate against the interests of its members in the future." *Id.* at 278. But when USAPA won the certification election and refused *in practice* to bargain for implementation of the Nicolau Award, a previously bargained-for award that the Airline had already accepted and continues to accept, this was not the announcement of an intention, but actual "act[ion] against the interest[s] of" the West Pilots-the precise point at which, it seems to me (and to the Second Circuit), a DFR breach occurs. *Id.* ("the breach occurs when the union acts against the interests of its members"); *see also Santos v. Dist. Council of New York City & Vicinity of United Brotherhood of Carpenters and Joiners of Am., AFL-CIO,* 619 F.2d 963, 970-71 (2d Cir.1980) (holding that a union breached its duty of fair representation, and a DFR claim began to accrue, at the time "appellants were aware that the [union] was not proceeding in good faith to seek enforcement of [an arbitration] award").

The majority argues that this case will not be ripe until "the airline responds to [USAPA's seniority] proposal, the parties complete negotiations, and the membership ratifies the CBA," Maj. Op. at 1180, but I respectfully disagree. Certainly this case might be "riper" were plaintiffs to wait for these future events, but when USAPA took the reins as the West Pilots' union and refused to pursue the Nicolau Award, USAPA's promise moved from abstract disagreement to adjudicable legal controversy. The future events cited by the majority are not likely to occur anytime soon, and plaintiffs will be harmed all the while. In the words of the *Thomas* Court, "[n]othing would be gained by postponing a decision...." 473 U.S. at 582, 105 S.Ct. 3325.

The ripeness inquiry is not concerned with whether a case is as ripe as it possibly could be. Twelve of the plaintiffs in *Thomas* had never even entered into FIFRA arbitration. Their claims would have been riper had they undergone FIFRA arbitration prior to joining with Stauffer in a challenge to FIFRA's arbitration procedures. Yet the Court noted these plaintiffs' "continuing uncertainty and expense" and explained that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 581, 105 S.Ct. 3325 (quotation marks omitted). No one disputes that the West Pilots are now suffering, and will continue to suffer, "continuing uncertainty and expense" due to the seniority impasse. They are entitled to have their claims heard.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT, D. ARIZONA

Don ADDINGTON; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki,

Plaintiffs,

-v.-

US AIRLINE PILOTS ASSOCIATION; US Airways, Inc.,

Defendants.

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, *et al.*,

Plaintiffs,

-v.-

Steven Bradford; Paul Diorio; Robert Frear; Mark King; Douglas Mowery; John Stephan, *et al.*,

Defendants.

Nos. CV 08-1633-PHX-NVW, CV08-1728-PHX-NVW

Filed July 17, 2009

Andrew S. Jacob, Don C. Stevens, II, Katherine V. Brown, Kelly Joyce Flood, Marty Harper, Polsinelli Shughart PC, Phoenix, AZ, for Plaintiffs.

Nicholas Paul Granath, Seham Seham Meltz & Petersen LLP, Minneapolis, MN, James K. Brengle, Duane Morris LLP, Philadelphia, PA, Lee Seham, Lucas K. Middlebrook, Stanley J. Silverstone, Theresa Ryan Murphy, Seham Seham Meltz & Petersen LLP, White Plains, NY, Nicholas Jason Enoch, Stanley Lubin, Lubin & Enoch PC, Phoenix, AZ, Karen Gillen, Sarah Ann Asta, US Airways Inc, Tempe, AZ, Rachel S. Janger, Tom A. Jerman, Omelveny & Myers LLP, Washington, DC, Robert Alan Siegel, Omelveny & Myers LLP, Los Angeles, CA, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER

NEIL V. WAKE, District Judge.

I. INTRODUCTION

Plaintiff pilots brought this suit on behalf of a class of similarly situated pilots formerly employed by America West Airlines. They allege that their current union, the U.S. Airline Pilots Association ("USAPA") breached its duty of fair representation. The case was tried to a jury. On May 13, 2009, the jury found in Plaintiffs' favor that USAPA had breached its duty by abandoning an arbitrated seniority list in favor of a date-of-hire list solely to benefit one group of pilots at the expense of an-

other. At the conclusion of the jury trial, a bench trial was held to determine the propriety, nature, and scope of any injunctive relief that would issue. The Court will now award injunctive relief as supported by the following findings of fact and conclusions of law. These findings are entered as required by Federal Rules of Civil Procedure 52(a) and 65(d), consistent with and supplementary to the facts already found by the jury in this case. The nature and scope of relief depends upon the specific facts underlying liability.

II. FINDINGS OF FACT

This dispute arises out of a particularly fraught area of labor relations: the integration of pilot seniority lists upon the merger of two airlines. From the perspective of the individual airline pilot, seniority is of the utmost importance. Wages improve with a pilot's position on the seniority list. So do working conditions. Seniority gives pilots priority for bidding on work opportunities-the more senior the pilot, the better the choices. Seniority impacts the rank a pilot may take, the aircraft a pilot may fly, and the control a pilot has over the work schedule. Seniority also determines the availability of preferred routes and "domiciles"-the locales where pilots are based. Seniority represents a significant investment of time in an industry where many pilots spend the bulk of their career at one airline. Most importantly, a pilot's position on the seniority list creates or limits exposure to demotions and "furloughs," the airline industry's euphemism for layoffs. Generally, the most junior pilots are furloughed first. Furloughed pilots enjoy a right of recall when hiring resumes, but until then they are

out of work at the airline. For all of these reasons, the process of combining two seniority lists during an airline merger raises stakes, emotions, and the risk of betrayal of principle to new heights. Such is the case here.

A. The Merger

In May 2005, two airlines, America West and U.S. Airways, merged to become a single airline known as U.S. Airways ("the Airline"). The America West pilots who were on the America West seniority list at the time of the merger are known as West Pilots. The U.S. Airways pilots who were on the U.S. Airways seniority list at that time are known as the East Pilots. As part of the merger, the two airlines planned to combine their operations into one, and as part of that process, the seniority lists of the two airlines would be integrated into a single list. As with any attempt to combine two separate seniority lists, this process pitted the seniority interests of the East Pilots against the seniority interests of the West Pilots. Any gain for one side would come at the expense of the other.

Adding tension was the comparative makeup of each pilot workforce. At the time of the merger and now, the East Pilots have been the bigger group: about 5100 pilots compared to about 1900 West Pilots. America West not only was the smaller of the two airlines, but it also was the younger. The 1900 West Pilots were generally hired within a more recent time frame than the East Pilots. The two groups differed in their wages and work status. The America West wages in place at the time of the merger were significantly more favorable than the

U.S. Airways wages. And all West Pilots were actively flying at the time of the merger, with hiring ongoing at the airline and a negligible history of furloughs. US Airways, on the other hand, found itself in the midst of bankruptcy proceedings with approximately 1700 of its pilots on furlough and no recall in sight. Many of the furloughed pilots had not flown for U.S. Airways for years.

From the time of the merger until April 2008, both pilot groups were represented by one union: the Air Line Pilots Association ("ALPA"). The internal structure of ALPA played a central role in the seniority integration process. Two different Master Executive Councils ("MECs") pursued the interests of each pilot group: the U.S. Airways Master Executive Council ("the East MEC") and the America West Master Executive Council ("the West MEC"). The union members of each pilot group elected representatives who chose officers for their respective MECs. The MECs, in turn, appointed individuals to various union committees. For instance, the MECs each appointed individuals to a single Joint Negotiating Committee charged with negotiating collective bargaining terms with the Airline on behalf of both groups. The MECs also appointed individuals to separate standing Merger Committees. Each pilot group's Merger Committee consisted of two pilot Merger Representatives who would participate in the integration process for the two seniority lists. Under ALPA's structure, any new collective bargaining agreement ("CBA") would require ratification by a majority of pilots in each of the two pilot groups.

On September 23, 2005, ALPA and the two merging airlines entered into a Transition Agreement setting forth the process of achieving the operational integration of the two airlines. The chairman of each MEC signed the agreement, witnessed by other union officials. The Transition Agreement provides that until operations are combined, "[t]he pilot workforces of America West and U.S. Airways will remain separate and covered by their respective collective bargaining agreements." With few exceptions, this status of separate operations places a fence between the former America West operations and the former U.S. Airways operations so that pilots for one side cannot fly the other side's routes or aircraft.

The Transition Agreement requires three conditions to be met before operational integration can take place. First, an integrated seniority list must be created. Second, the union must conclude a single CBA for both pilot groups, incorporating the integrated seniority list. Third, the Airline must obtain a single FAA operating certificate, which it has done. Because no new CBA is in place, the Airline carries on in a state of separate operations. Efforts toward a new CBA have been complicated by the process of deciding what seniority list the CBA will include.

B. The Nicolau Award

The Transition Agreement also specifies how to integrate the two seniority lists: "The seniority lists of America West pilots and U.S. Airways pilots will be integrated in accordance with ALPA Merger Policy and submitted to the Airline Parties for accep-

tance." In turn, ALPA Merger Policy [ex. 3, hereinafter cited as "MP"] provides a step-by-step process of integrating the lists. At the first stage, the parties attempt to negotiate a single list. [MP pt. 1.G.] If negotiations fail, a mediator is selected from a predetermined list through a series of strikes, and mediation ensues. [MP pt. 1.H.] If mediation fails, the mediator conducts a "final and binding" arbitration to arrive at a merged list, sitting as the chairman of a three-person arbitration board. [MP pt. 1.H.] Once the representatives conclude the process of integrating the seniority lists, the list is not subject to a separate ratification vote by the union membership. [MP pt. 1.D.] The integrated list is to be presented as part of any new CBA, however, which is subject to membership ratification.

In accordance with the Transition Agreement and ALPA Merger Policy, the Merger Representatives for the East and West Pilots began negotiating over seniority in August 2005. The circumstances of the two pilot groups prevented the two sides from reaching agreement. In particular, the East Merger Representatives thought that East Pilots were entitled to seniority rights based upon their dates of hire, including East Pilots who were on furlough at the time of the merger. The West Merger Representatives thought that these furloughees should be placed at the bottom of the list, with the remaining pilots merged into one list according to their relative positions on the original seniority lists for each of the merging airlines.

Failing to reach any negotiated compromise, the Merger Representatives began the next step of the ALPA Merger Policy process: mediation. By alter-

nating strikes from the predetermined list of mediators, George Nicolau was selected as the mediator. Mediation took place in October 2006. Like negotiation, the mediation failed to produce an agreed-upon, integrated seniority list. The Merger Representatives then proceeded to the third step of the ALPA Merger Policy process, entering into arbitration (the "Nicolau Arbitration") with George Nicolau presiding along with two non-voting pilot representative from other airlines, one designated by each pilot group. The arbitration proceedings began in December 2006 and concluded in February 2007.

The Nicolau Arbitration panel issued its award (the "Nicolau Award") in the first week of May 2007. The award struck a compromise between the requests of both sides. It placed about 500 senior East Pilots at the top of the list, against the wishes of West Pilots, because of their special experience with wide-body international aircraft that America West was not operating before the merger. It placed approximately 1700 East Pilots who had been furloughed at the time of the merger at the bottom of the list because of their greatly diminished career expectations. Then it blended the remainder of the East Pilot list with the West Pilot list generally according to the relative position of the pilots on their original lists.

Before, during, and after the arbitration, both sides understood that any arbitrated result would be final and binding as provided in ALPA Merger Policy, and that the Transition Agreement required implementation of the Nicolau Award along with any new single CBA. Each side presented exhaus-

tive proof in support of its case over the course of 18 days of hearings, with 20 witnesses and 14 volumes of exhibits. They filed comprehensive post-hearing briefs. There is no persuasive evidence that any East or West Pilot doubted the finality of the arbitration before it took place.

The Nicolau Award caused outrage among many East Pilots. The East Merger Representatives sought to have the award overturned and petitioned ALPA to revisit it. Emotions flared for weeks and months to follow while ALPA attempted to broker a compromise between the two pilot groups. Understanding that ratification of any single CBA by both pilot groups was essential, ALPA's Executive Council passed a resolution on May 24, 2007, urging both MECs to "explore consensual approaches that promote career protection and mutual success, and achieve an acceptable single [CBA] that improves pay, benefits, work rules, and job security for both pilot groups." Further efforts at compromise took place at certain union-organized conferences over the summer. No compromise resulted.

While the arbitration was pending, negotiations with the Airline progressed. In May 2007, the ALPA Joint Negotiating Committee received a comprehensive CBA proposal from the Airline known as the Kirby proposal. [Ex. 98.] While the union and the Airline remained far apart on many terms of employment, this proposal represented significant progress in negotiations and included a pay increase for both pilot groups worth $122 million per year. The West Pilots' increase was modest, but the introduction of equal pay for both pilot

groups would mean a pay increase for East Pilots worth $108 million per year. This proposal has remained on the table.

On August 15, 2007, the East MEC withdrew its representatives from the Joint Negotiating Committee. This tactic halted negotiations between the union and the company toward a single new CBA. By October 1, 2007, the ALPA Executive Council had determined that there were no grounds under ALPA Merger Policy for setting aside the Nicolau Award. ALPA's president criticized the East MECs actions and stated that it was "time for the [East] MEC to comply with its representational and legal obligations under the Constitution & Bylaws, ALPA Merger Policy, the Transition Agreement, and implementing resolutions of the Executive Council" and "adopt a resolution ... reversing all prior efforts to bar or precondition the continuation of joint negotiations." [Ex. 19.]

The East MEC never returned to negotiations. ALPA submitted the Nicolau Award to the Airline in late 2007. The Airline accepted the award on December 20, 2007, as it was required to do if the award complied with certain basic requirements of the Transition Agreement.

C. The Formation and Election of USAPA

Another story was unfolding during this course of events. On May 16, 2007, shortly after the issuance of the Nicolau Award, East Pilot Stephen Bradford wrote a letter to the ALPA Executive Board announcing his intent to leave ALPA. He voiced hostility to the Nicolau Award, claiming that he did

not want to leave the union but that the Nicolau Award left him little choice. In his view, it was necessary to leave in order to "write our own merger policy into our bylaws" and "just to protect what little we [East Pilots] have left." [Ex. 107 at 1-2.] He asserted that the East Pilots' majority status in the union would enable them to achieve their aims. He and other East Pilots formed a committee to explore how to prevent implementation of the Nicolau Award by forming and certifying a new union with a different seniority objective. They received advice from a lawyer to take care with "the language you use in setting up your new union" and not to "give the other side a large body of evidence that the sole reason for the new union is to abrogate an arbitration." [Ex. 14.]

Mr. Bradford and other East Pilots proceeded to form Defendant USAPA. On August 10, 2007, they announced that they held nearly enough popular support to force a representation election. On November 29, 2007, the National Mediation Board certified a representation election. USAPA's campaign purported to address other areas of pilot discontent, but it communicated a clear message to East Pilots that its seniority policy would be more favorable to them than the Nicolau Award. USAPA promised that as certified bargaining representative, it would negotiate for a date-of-hire seniority integration rather than the Nicolau Award. Many West Pilots opposed the campaign, and ALPA objected to the East MECs "failure to respond to and defend against" it. [Ex. 19.] USAPA won the election, and the National Mediation Board certified USAPA as the East and West Pilots' collective bar-

gaining representative on April 18, 2008, with Mr. Bradford as its president.

Five months later, USAPA adopted and presented to the Airline its own seniority proposal. This proposal constructs a seniority list based upon each pilot's date of hire, with West Pilots generally falling to the bottom of the list. The proposal also includes certain conditions and restrictions providing limited protection to West Pilots. For example, it provides that reductions in the number of captain positions would be shared between the two pilot groups on a pro rata basis. Also, West Pilot positions in existence on June 1, 2008, are protected such that East Pilots cannot bid into those positions. But significant limitations attend these protections. First, they expire after ten years. Second, a West Pilot "forfeit[s] his/her right with respect to all protected position provisions" if he or she fails to bid on or accept an available protected position or bids on a non-protected position. Third, the date-of-hire list supersedes all conditions and restrictions, including the pro rata allocation of position reductions, in the event of a catastrophic reduction of 25% or more of the total number of pilot positions. Finally, all furloughs and recalls still are implemented "on an integrated [date-of-hire] seniority list basis" regardless of protected position provisions.

Taking all of the conditions and restrictions into account, the Court finds that the terms of USAPA's seniority proposal are substantially less favorable to West Pilots than the Nicolau Award. The ten-year period of conditions and restrictions provides some protection to West Pilots, but once that period

expires, even assuming rapid attrition of senior East Pilots, the West Pilots find themselves with diminished career opportunities relative to their position on the Nicolau List. More importantly, USAPA's proposal exposes the West Pilots to grave new economic perils. Any furlough will take a disproportionate toll on West Pilots, as will any catastrophic reduction in force-both realistic possibilities. At the time of the merger, 33% of East Pilots were on furlough status, a number roughly corresponding to 24% of the merged pilot workforce and 89% of the West Pilot workforce. If the very circumstances at the time of the merger were to recur under USAPA's seniority proposal, many of the West Pilots would lose their jobs to now-working East Pilots who were unemployed at the time of the merger. While all of these factors support the finding, they are not all necessary. The sole fact that USAPA's seniority proposal disfavors West Pilots for furlough purposes compels, on its own, the conclusion that the proposal is far less favorable to West Pilots than the Nicolau Award. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 796, 800 (7th Cir.1976).[FN1]

> FN1. USAPA also argues that the minimum fleet requirements of the Transition Agreement prevent any further significant furloughs. This argument has little force because USAPA's integrated seniority proposal only goes into effect when operations are integrated after the conclusion of a single new CBA, which may or may not have its own fleet requirements. The fleet requirements of the Transition Agreement are expressly lim-

> ited to the period of separate operations. [Ex. 21, at II.B.]

The Airline has received USAPA's seniority proposal but has not responded to it. USAPA and the Airline continue to negotiate toward a new CBA. Any new CBA is now subject to USAPA's ratification process, which differs from ALPA's. Under USAPA's constitution, ratification requires a majority vote of the entire union membership, not separate votes of the two pilot groups. This system deprives both pilot groups of their separate veto powers.

D. USAPA's Objectives

USAPA's sole objective in adopting and presenting its seniority proposal to the Airline was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining unit as a whole. Its constitution includes a commitment "to maintain uniform principles of seniority based on date of hire and perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's unmerged career expectations." USAPA officers have promised to "overturn" the Nicolau Award, and USAPA considers itself constitutionally bound never to implement it. Counsel for USAPA concedes that the union will never do so. [Doc. # 574 at 1047.]

As explained below, other motivations USAPA presented at trial were insufficient as a matter of law to justify its course of action. Some were simply pretextual.

E. Furloughs of West Pilots

Continuing in a state of separate operations, economic forces have caused the Airline to reduce flying. Most of these reductions have occurred in the western operations. As a result, the Airline has announced plans to furlough 300 pilots, including approximately 175 West Pilots. The Transition Agreement generally prevents East and West Pilots from flying in the other group's operations, so furloughs take place in the locales where flying is reduced, according to the two separate seniority lists. Approximately 140 West Pilots had been furloughed by the time of trial. The group of presently furloughed pilots includes Plaintiff Worgocki, Plaintiff Bostic, and Plaintiff Iranpour. If a single CBA that incorporated the Nicolau Award were in place and operations integrated, none of the West Pilots would be furloughed at this time.

F. Procedural History

On September 4, 2008, in response to USAPA's actions, six individual West Pilot Plaintiffs brought this action against USAPA and the Airline alleging that USAPA had breached its duty of fair representation and that the Airline had breached a CBA. The complaint sought damages as well as injunctive relief. Plaintiffs also moved for a preliminary injunction to restrain the Airline from furloughing West Pilots ahead of East Pilots who had been on furlough at the time of the merger. The Court granted the Airline's motion to dismiss for failure to exhaust administrative remedies. It denied USAPA's motion to dismiss the fair representation

claim under Fed.R.Civ.P. 12(b)(1) and (6); that claim is the subject of this trial.

Around the same time, Plaintiffs also filed a state court action on behalf of a class of West Pilots against a class of East Pilots. This complaint alleged various state law causes of action against the East Pilots. After removal and consolidation, the state-law causes of action were dismissed as preempted by the Railway Labor Act.

On November 21, 2008, trial in the fair representation case was accelerated and bifurcated into two stages to expedite resolution of this urgent case. The first stage would address the liability of the union and the propriety of injunctive relief. In the event of a verdict finding USAPA liable, the second stage would address the causation and quantification of any damages owed to Plaintiffs. Trial on liability was set to occur no later than February 17, 2009. One week after trial was set, Plaintiffs filed an amended complaint in the fair representation action, specifying that the suit was brought on behalf of a class of similarly situated West Pilots. Because of the surprise to USAPA and the need for class discovery, trial was continued. Briefing followed on certification as well as the right to a jury trial. The Court certified the class of West Pilots and granted USAPA's request for a jury trial under the Seventh Amendment. The Ninth Circuit denied USAPA's request for interlocutory review of the certification order. Because the class was not certified as to Plaintiffs' compensatory damages claims, the jury trial right attached only to the damages claims of the six individual Plaintiffs.[FN2] A jury trial would nonetheless be held at the liability

stage because the damages claims would hinge on the adjudication of liability.

> FN2. Plaintiffs' motion to certify the class also referred to a class-wide refund of union dues and fees. USAPA's Motion for Judgment on the Pleadings was granted as to this claim.

On March 3, 2009, shortly before the class was certified, a new trial date was set. Over USAPA's objection, trial on the liability facts and injunctive relief would now take place beginning April 28, 2009. The parties proceeded to and through trial according to plan. The jury retired after approximately nine days of evidence and returned a verdict for Plaintiffs. Bench proceedings then were held respecting the propriety and scope of injunctive relief. No new evidence was introduced at the bench trial beyond that presented to the jury.[FN3]

> FN3. Plaintiffs offered new testimony of Brian Stockdell regarding certain Airline logistics but withdrew the request for relief for which it was offered. Therefore, this withdrawn testimony is not considered and has no effect upon the present order. Cross-examination of Stockdell was not permitted when USAPA could not state any purpose for cross-examining other than to refute his withdrawn testimony concerning the withdrawn remedy.

III. CONCLUSIONS OF LAW

"In chasing down the myriad arguments of the parties, [the Court has] pursued both the fox of enlightenment and the hare of obfuscation through the bramble of labor law." *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 609 (1st Cir.1987). The First Circuit wrote those words about a contentious union seniority case, and the same sort of chase has occurred here. While neither side has refrained from taking dubious legal positions, USAPA has at various stages misstated law, facts, and procedural history, with frequent recourse to the "contradiction or confusion ... produced by a medley of judicial phrases severed from their environment." *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 106, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (Frankfurter, J.). It is therefore necessary to cut a path through much labor law bramble on the way to granting relief. First, this Order explains the theory supporting liability. Second, it reaffirms and elaborates upon the subject matter jurisdiction and ripeness, best understood in light of the merits. Third, it outlines the propriety, scope, and nature of relief granted.

A. Duty of Fair Representation

A jury has already found that USAPA breached its duty of fair representation with respect to the West Pilots. In short, USAPA violated the duty because it cast aside the result of an internal seniority arbitration solely to benefit East Pilots at the expense of West Pilots. USAPA failed to prove that any legitimate union objective motivated its acts.

In general, a union owes a duty of fair representation to all members of the bargaining unit it repre-

sents. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir.2002). This duty "arises from a union's statutory role as the exclusive bargaining representative for a unit of employees"; it attaches only at the time that a union becomes certified as the exclusive bargaining representative for the bargaining unit. *See id.* at 1169-71. The duty has evolved as a judicial check on the union "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 1169 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)).

"Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177. Put another way, the duty prohibits unions from acting in a way that is "arbitrary, discriminatory, or in bad faith." *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 879 (9th Cir.2007) (quoting *Vaca*, 386 U.S. at 190).

1. Bargaining Backdrop

"The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others. In these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis." *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020,

1023 (9th Cir.1990). For this reason, ALPA had established an internal procedure for the integration of seniority lists in the merger scenario. *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 217 (9th Cir.1989); *see also Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1107 (2d Cir.1991).

The Nicolau Arbitration was intended to provide a conclusive resolution of the conflicting seniority interests of the East Pilots and the West Pilots. The Transition Agreement generally required the parties to follow ALPA Merger Policy to integrate the seniority lists. The parties bound by that agreement included the union "by and through the Master Executive Councils of the America West and U.S. Airways pilots." Both MEC chairmen signed the agreement with the ALPA President, witnessed by other union officials.

ALPA Merger Policy (cited as "MP") provided for the procedures leading up to and resulting in the issuance of the Nicolau Award. It also dictated the award's significance. "The purpose of arbitration shall be to reach a fair and equitable resolution consistent with ALPA policy." [MP § 1.H.I.b.] "The Award of the Arbitration Board shall be final and binding on all parties to the arbitration and shall be defended by ALPA." [MP § 1.H.5.] "The merged seniority list will be presented to management and ALPA will use all reasonable means at its disposal to compel the company to accept and implement the merged seniority list." [MP § 1.I.1.] "The arbitration award issued after proceedings under [the Merger Policy] shall be the position of ALPA with management ...." [MP § 1.I.7.] The Policy Compliance provision states that "[a]ny attempt by a member

or members of ALPA to obtain an agreement which would operate to frustrate the objectives of this policy shall be considered an act contrary to the best interests of ALPA and its members." [MP § 3.C.]

USAPA does not dispute that it succeeded to ALPA's rights and obligations under the Transition Agreement. Nonetheless, USAPA contends that the Nicolau Award does not limit USAPA in any sense. USAPA relies heavily on the following stipulation: "The parties to the Nicolau Arbitration were stated to be 'the U.S. Airways Pilot Merger Representatives and the America West Pilot Merger Representatives.' " USAPA suggests that the Nicolau Award bound only the merger representatives, with the sole effect of precluding those representatives from asserting the existence of any disagreement between them regarding the Nicolau Award. The award, according to USAPA, was imposed on the East Pilots without their consent; ALPA, and by extension USAPA, remained free to order its affairs as though the award had never happened.

This argument offends common sense, the evidence, and fundamental principles of law. In the context of labor rights, it is both discordant and irrelevant. Generally, properly appointed representatives acting within the scope of their authority do bind those they represent. ALPA Merger Policy provides that the Merger Representatives "shall have complete and full authority to act for and on behalf of the flight deck crew members of their respective airlines for the purpose of concluding a single flight deck crew member seniority list, which shall not be subject to ratification." [MP § 1.D.3.] This is not a dispute about the personal contractual obligations

of East Pilots.[FN4] The East Pilots took on the benefits and burdens of ALPA's representative actions when they elected to be represented by that union. They gave their political consent to the actions of the merger representatives when they elected the East MEC that appointed them. *Cf. Ackley v. W. Conference of Teamsters,* 958 F.2d 1463, 1478 (9th Cir.1992) (explaining that unions exist and take action subject to union members' voting rights); 45 U.S.C. § 152 Fourth (protecting a bargaining unit's right to choose a union by majority vote). The East Pilots and ALPA were therefore bound, in the legislative sense of collective bargaining, by ALPA's Transition Agreement commitment "by and through" the East MEC to follow ALPA Merger Policy in merging the seniority lists. *See Humphrey v. Moore,* 375 U.S. 335, 337-38, 347-48, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964) (holding that union discharged its duty of fair representation by resolving a seniority dispute in accordance with negotiation and arbitration procedures of a CBA negotiated by a multi-local union and executed by each appropriate local union).

> FN4. As already noted, Plaintiffs' parallel suit alleging state law claims against a putative class of East Pilots was dismissed as preempted by the statutory duty of fair representation.

Although the Court finds that the unambiguous language of the Transition Agreement resolves the question on its own, the East MECs course of conduct during and after the Nicolau Proceedings confirms that the award was intended to be "final and binding" as to the two pilot groups. USAPA pre-

sented no evidence that the East MEC or any East Pilots regarded the Nicolau Arbitration as an academic exercise before or while it took place. To the contrary, the East Pilots exhibited a solemn resolve to make their case. Both sides presented voluminous economic evidence over the course of several weeks of hearings. The East MEC pressed hard to have the award overturned within the ALPA framework. Finally, the East MEC attempted to subvert the award's implementation by withdrawing from merger negotiations altogether. Rather than cast doubt on the final and binding nature of the award, these actions show that from the East MECs perspective, the award was most final and most binding. ALPA's attempts to negotiate a compromise between the two pilot groups do not belie the award's finality; those attempts reflect an understanding that the West Pilots, through the West MEC, were entitled to sit on their rights. At no time did ALPA assert the power to impose a different seniority proposal on the West Pilots without their consent.

The award shapes USAPA's duty here even though the Transition Agreement could be amended by mutual agreement of the union and the Airline. US Airways has already accepted the Nicolau seniority list, and the evidence shows no reason for amendment other than USAPA's internal purposes. As explained further on, amendment needs some legitimate union objective. Amendment is not a sufficient purpose unto itself, a kind of union wild card that covers for any purpose, good or ill. The power of amendment does not trump the union's duty of fair representation; it must serve it.

2. Theory of Liability

In general, a union meets its duty of fair representation as long as its actions fall within a "wide range of reasonableness." *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). This latitude includes a right on the part of the union to change bargaining positions midstream. *Barton Brands, Ltd. v. NLRB,* 529 F.2d 793, 800 (7th Cir.1976). There is nothing intrinsically wrong with bargaining for seniority integration based upon the date of hire; date-of-hire seniority is "generally ... an equitable and feasible solution" to the problem of merging seniority lists. *Truck Drivers, Local Union 568 v. NLRB,* 379 F.2d 137, 143 n. 10 (D.C.Cir.1967); *see also Laturner v. Burlington N., Inc.,* 501 F.2d 593, 598-603 (9th Cir.1974). Seniority rights do not "vest" with the union members in any proprietary sense. *See Hass v. Darigold Dairy Prods. Co.,* 751 F.2d 1096, 1099 (9th Cir.1985). Even when an internal union arbitration resolves a seniority dispute, it is not necessarily improper for a union to pursue an alternative outcome. *Associated Transport, Inc.,* 185 NLRB 631, 635 (1970) (unfair labor practice case).

USAPA clings to these generalities, but they give no protection here. The question is not whether USAPA made a seniority proposal that is acceptable in the abstract, or whether USAPA deprived certain employees of their property rights, or what position it could have taken before agreement to a different final and binding process. The question is not whether USAPA has the right to adjust its bargaining position, even after playing out an agreed final and binding process, for some good reason.

The legal question is whether USAPA-or any union-violates its duty of fair representation by adopting and promoting a certain integrated seniority list for no reason other than to favor one group of employees at the expense of another. An established genre of fair representation decisions says yes.

The first is *Bernard v. Air Line Pilots Association, International,* which concerned the merger of Alaska Airlines and Jet America, Inc. 873 F.2d 213 (9th Cir.1989). ALPA was the certified bargaining representative for all Alaska Airlines pilots, but the Jet America pilots were not members of the union. *Id.* at 214. Nonetheless, ALPA owed a duty of fair representation to the Jet America pilots. *Id.* at 216. When it came time to integrate the seniority lists of the two airlines, ALPA did not follow its own policy, namely the process of negotiation, mediation, and, if necessary, arbitration. *Id.* at 215. The employer excluded all Jet America pilots from seniority negotiations. *Id.* The Jet America Pilots succeeded in their fair representation action because they had been excluded from negotiations and because ALPA did not follow its own policy. *Id.* at 216-17. The court rejected the union's purported justifications for its actions: that it was reasonable to "speak [ ] to management as one voice," that the union's seniority decisions were consistent with the respective career expectations of the pilot groups, and that ALPA's duty to the Jet America Pilots was no broader than its general duty to the pilot group as a whole. *Id.* ALPA had disregarded its neutral merger policy to discriminate against the previously non-unionized pilots. *Id.* at 217. Indeed, at the time of the seniority negotiation, ALPA's presi-

dent had disclaimed any duty to the Jet America pilots. *Id.* Under *Bernard*, a union may not diverge from its merger policy solely to advance the seniority rights of union members at the expense of non-union members. *Id.*

A similar rule finds expression in *Truck Drivers, Local Union 568 v. NLRB*, 379 F.2d 137 (D.C.Cir.1967).[FN5] *Truck Drivers* holds that a union's fulfillment of its promise to "renounce[ ] any good faith effort to reconcile" the seniority interests of two employee groups would lead to a violation of its duty of fair representation. *Id.* at 142-43. Of particular relevance was the union's sole motivation to "win[ ] an election by a promise of preferential representation to the numerically larger number of voters." *Id.* at 143; *see also Hardcastle v. W. Greyhound Lines*, 303 F.2d 182, 186-87 & n. 10 (9th Cir.1962) (affirming grant of summary judgment for defendants in fair representation claim because plaintiffs failed to show a lack of "discriminatory action in favor of one politically stronger local or faction of the union against a politically weaker local or faction"); *Associated Transport*, 185 NLRB at 635 (union may not revisit seniority for improper purpose).

> FN5. *Truck Drivers* concerned allegations of unfair labor practices, but the Board's imposition of liability was affirmed with reference to standards of fair representation.

The Seventh Circuit has embraced the same principle. In *Barton Brands*, two seniority lists were dovetailed, that is, combined on a date-of-hire basis, upon the merger of two companies. 529 F.2d at

795-96. Layoffs began, and the larger of the two merged workforces decided that the existing seniority integration was unfair. *Id.* at 796. The union formulated a new proposal that dovetailed the two lists for most purposes, but placed the smaller workforce at the bottom of the list for layoff purposes. *Id.* A majority of the union membership ratified the new arrangement. *Id.* The union met judicial rebuke. Abridging "the established seniority rights of a minority of the Barton employees ... for no apparent reason other than political expediency" constituted an unfair labor practice reflective of fair representation doctrine. *See id.* (citing *Hargrove v. Bhd. of Locomotive Engineers,* 116 F.Supp. 3 (D.D.C.1953) (fair representation case)). On remand, the Board was instructed "that in order to be absolved of liability the Union must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority." *Id.*

The Seventh Circuit has reaffirmed this theory of liability, addressing USAPA's very posture in dictum. In *Air Wisconsin Pilots Protection Committee v. Sanderson,* 909 F.2d 213 (7th Cir.1990) (Posner, J.), two airlines merged, and both pilot groups were represented by ALPA. ALPA followed its merger policy and the seniority integration issue went to arbitration. *Id.* at 215. "The arbitrators split the difference," giving each group of pilots less than it had asked for. *Id.* Some pilots from one of the merging airlines "tried to replace ALPA as a collective bargaining representative ... with a newly created union" but they were outvoted. *Id.* When the MEC for the disgruntled pilot group proposed replacing the arbitrated list with a list based on length of

service-a proposal corresponding to their position before the arbitration panel-ALPA placed the MEC in trusteeship. *Id.* at 216. Then, as now, ALPA MECs may be placed in trusteeship if they fail to comply with ALPA's Constitution, By-Laws, or representational obligations. *Id.* at 215.

The disgruntled pilots brought a fair representation suit, and its dismissal was affirmed. The court reasoned that the arbitration process was fair and the arbitrators' award definitive under ALPA policy. *Id.* at 216. "If ALPA were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security" and "disputes over seniority would fester-as they have done in this case." *Id.* In a concluding dictum, the court noted that "an attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by plaintiffs," that is, by "ousting ALPA in favor of a union not pledged to defend the arbitrators' award [,] ... could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool." *Id.* at 217.

In *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir.1992), ALPA was allowed to depart from its Merger Policy and to change its negotiating position midstream by promoting a seniority list that favored the preference of a majority of the employees in the bargaining unit. *Rakestraw* did not abandon or undercut the rule that a union may not reshuffle a seniority list for improper reasons. To the contrary, it reaffirmed *Barton Brands*, holding that "a union may not juggle the seniority roster for no reason other than to advance one group of

employees over another," and it cited *Air Wisconsin* without criticism. *Rakestraw*, 981 F.2d at 1530, 1533, 1535. There was no breach of duty where no ill motive existed or where ALPA acted, at least in part, to "rationally promote the aggregate welfare of employees in the bargaining unit" by pursuing "two rational and appropriate objectives" without discrimination between different groups of employees. *Id.* at 1535.

The influence of *Barton Brands* extends well beyond the Seventh Circuit. The Second Circuit follows its holding. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists*, 378 F.3d 269, 277 (2d Cir.2004). So too does the First Circuit. *See Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir.1987). [FN6] "Union members are to be accorded equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically favored group ....' " *Id.* (quoting *Barton Brands*, 529 F.2d at 799) (alterations original).

> FN6. Like *Truck Drivers*, this unfair labor practices case relies upon fair representation principles.

3. Legitimate Union Objectives

The question then arises, what kind of justification can the union rely upon to avoid liability? USAPA has advanced a broad reading of *Rakestraw* under which any rational relation to a legitimate union objective will suffice, regardless of the union's actual motives. Plaintiffs, on the other hand, proposed an alternate view where the court would evaluate a union's primary motive for the actions it

takes. Neither approach is reflected in the case law. Liability attached because USAPA's only actual motivation in adopting and presenting its seniority proposal was to benefit East Pilots at the expense of West Pilots.

Union liability for discrimination or bad faith requires a subjective examination of the union's actual motives and purposes. *Simo v. Union Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir.2003). *Rakestraw* consones to this rule, resting not on hypothetical connections to legitimate union objectives, but rather on the actual reasons the union had for choosing its course of action. 981 F.2d at 1532. That case took up two fact situations addressing the same legal issue. In the first, a larger airline acquired a smaller airline. *Id.* at 1526. ALPA disregarded its Merger Policy in the process of integrating the seniority lists, and the smaller pilot group acquiesced in the result-a date-of-hire list favoring the majority. *Id.* at 1527. Later, the minority brought suit against the union. *Id.* The union was held to be in pursuit of a legitimate objective because the larger, acquiring airline did not need the smaller group of pilots and was unlikely to agree to any arrangement disfavoring its own pilots. *Id.* at 1533. Moreover, "there [was] no evidence that ALPA's leaders had it in for the [smaller pilot group]." *Id.* at 1527.

In the second *Rakestraw* situation, ALPA was in the process of negotiating a post-merger CBA, including a date-of-hire seniority list. *Id.* at 1527. Negotiations broke down and the pilots went on strike. *Id.* at 1528. In response, the airline em-

ployer hired 219 replacement pilots. It also hired 320 student pilots who did not begin work during the strike. *Id.* At the same time, almost all 570 striking pilots honored the picket line. *Id.* After the strike, no CBA was in place, and ALPA had no alternative but to accept the airline's proposed seniority list with strike-breakers and student trainees at the top of the list. *Id.* at 1528-29. The striking pilots, constituting a majority in the union, made aggressive protest. *Id.* at 1529. Ultimately, management and the union agreed to put the 570 striking pilots at the top of the list according to date of hire, above the 219 strikebreakers and the 320 student pilots. *Id.* The strike-breakers brought a fair representation claim. *Id.*

The union "detested" the strike-breakers and "[t]his loathing played a role in the union's efforts to increase the seniority of the Group of 570." *Id.* Nonetheless, ill will or a desire for retribution does not "spoil an agreement that rationally serves the interests of labor as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union." [FN7] 981 F.2d at 1532, 1535. Critical to the court's reasoning was that "ALPA had at least two rational and appropriate objectives" satisfying the rule of *Barton Brands*. *Id.* at 1535. It wanted to harm the strike-breakers, and it also sought to restore the seniority of the 570 pilots that it had defended before the strike. By punishing employees who crossed the picket line, the union could "strengthen the hand of organized labor in future conflicts with management," in effect "shor[ing] up the monopolistic quality of organized labor." *Id.* By acting to restore a seniority system vis-a-vis newly

hired pilots, the union served the legitimate objective of "stability" by protecting long-term employee expectations against outright erasure. *Id.* (citing *McCann v. City of Chicago,* 968 F.2d 635 (7th Cir.1992) (equal protection case) and *Nordlinger v. Hahn,* 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (same)). No holding of *Rakestraw* precludes liability for discriminatory or bad faith action when a union's sole motivation is improper.

> FN7. Analogizing to the legislative sphere, the court stated, "A discriminatory motive without a discriminatory rule does not condemn a statute." *Rakestraw,* 981 F.2d at 1532.

In *Ramey v. District 141, International Association of Machinists,* the Second Circuit considered *Rakestraw'* s statement that "[a] rational person could conclude that dovetailing seniority lists in a merger ... serves the interests of [the union membership] as a whole." 378 F.3d 269, 277 (2d Cir.2004) (alterations original). The *Ramey* court distinguished between a bare challenge to union action and a challenge to union action with evidence of an improper purpose. "Unlike in Rakestraw," where the first fact pattern presented no evidence of hostility in merging seniority lists on a date-of-hire basis, "plaintiffs here do not suggest that [the union] acted improperly merely by dovetailing the seniority lists." *Id.* "Rather, they argue that [the union] was motivated by retaliatory animus in choosing which seniority dates to apply." *Id.* Liability attached because the alteration of seniority based solely on retaliatory animus was not objectively reasonable. *Id.* Once the jury rejected the union's

purported neutral motivation as pretext, it could conclude that hostile motives alone motivated the union action. *Id.* at 284. A rational relation to purportedly neutral purposes could not defeat liability where the only actual motive was improper. *Id.*[FN8]

> FN8. *Ramey* imposed liability because the union was motivated to punish employees who had been affiliated with another union. These employees had also refused to participate in a strike. *Ramey* does not address *Rakestraw'* s holding that punishing strikebreakers is a legitimate union objective, and that issue is not before the Court.

For these reasons, the jury in this case was instructed as follows: "Even if the union's conduct could be rationally related to a legitimate union objective, the union can be liable for violating its duty of fair representation if its actions are shown to be solely motivated by objectives that are not legitimate union objectives." To the extent USAPA reads a stronger rule into *Rakestraw,* a rule that would validate all union conduct that could be rationally related to legitimate union objectives irrespective of actual motive, USAPA's reading is rejected and would not be persuasive if accepted because it runs against the scheme of fair representation doctrine already discussed, including Ninth Circuit precedent. *See Rakestraw,* 989 F.2d 944, 945-48 (7th Cir.1993) (Ripple, J., dissenting from denial of rehearing *en banc*) (interpreting the panel decision in this strong manner and arguing that it violates Supreme Court and Seventh Circuit precedent); *Bernard,* 873 F.2d at 216-17 (looking beyond plausibly rational basis to actual union motive); *Simo,*

322 F.3d at 618 (requiring this inquiry in the Ninth Circuit); *Associated Transport,* 185 NLRB at 635 (examining actual union motive). USAPA's proposed rule would collapse "bad faith" and "discrimination" into an arbitrariness inquiry that does not apply. *See Beck v. United Food & Comm. Workers Union, Local 99,* 506 F.3d 874, 879 (9th Cir.2007).

Conversely, this Court rejected the Plaintiffs' suggestion that a bad motive combined with a good motive could still produce liability where the bad motive predominates. *See Rakestraw* 981 F.2d at 1534 (rejecting mixed-motive liability); *Ramey* 378 F.3d at 284 (relying upon a showing of pretext); *Barton Brands,* 873 F.2d at 217 (noting that ALPA acted solely on the basis of union membership). It may be possible and desirable to fashion a framework for adjudicating mixed-motive fair representation cases, but Plaintiffs cite nothing allowing this Court to thus better the precedents. Regardless, the jury found that only an improper motive, and no proper motive animated USAPA's seniority agenda.

4. USAPA's Seniority Objective

There is no merit to USAPA's argument that the pursuit of date-of-hire seniority principles automatically legitimates USAPA's actions because date-of-hire seniority is "the gold standard" of integration methods. [Doc. # 482, at 1902.] The jury was instructed that "[i]n this case, a general preference for any particular seniority system other than the Nicolau Award, standing alone, is not a legitimate union objective." USAPA's argument is

little more than a circular rationalization for its departure from the Nicolau Award to favor the majority. The Nicolau Arbitration occurred on the premise that insisting in advance on one seniority system or another could not reconcile the interests of the two pilot groups. The decision to follow a given seniority philosophy in this case could always be viewed as politically motivated by the interests of one pilot group or the other. Fairness could be found only in an agreed procedure, not in an agreed outcome. The Transition Agreement and the Nicolau Arbitration provided USAPA with a "final and binding" internal compromise. The union no longer lacked an appropriate resolution of these irreconcilable interests.

There is no authority for a magic rule that date-of-hire stops all inquiry on the duty of fair representation, in disregard of circumstances. The significance of date-of-hire seniority varies from one labor negotiation to the next. The bankrupt position of U.S. Airways at the time of the merger, with almost as many furloughed pilots as America West had working, and with a significant furlough history, lent date-of-hire integration some hues of inequity it might not have had in another merger. The question before the arbitrator was not whether date-of-hire seniority, in the abstract, was a desirable thing, but whether it would provide a fair and equitable answer to the career expectations of the unmerged pilot groups.

USAPA has maintained from the beginning that no union has ever faced liability based on the pursuit of date-of-hire principles.[FN9] *Ramey* refutes this in its holding. 378 F.3d at 274-75.[FN10] The union in

Ramey was liable, notwithstanding its date-of-hire list, because it drew up that list so as to punish inimical employees. *Id.* A date-of-hire proposal does not immunize or condemn union action; the policy preference is generally permissible. It is the manipulation of the seniority proposal in context that gives rise to the claim. USAPA's date-of-hire agenda is just a means of changing the arbitrated outcome for no purpose other than to favor the majority.

> FN9. The record contains at least twelve representations to this effect. [*See, e.g.*, doc.80 at 61, 149, 162; 215 at 5 & n. 5; 348 at 96; 351 at 3, 8; 359 at 2; 389 at 55; 444 at 6-7; 482 at 1757; 495 at 4-5.] USAPA quite recently stated, "The mere fact that-the mere evidence that Date-of-Hire was preferred by USAPA, that's not itself evidence of anything other than that they preferred an entirely legitimate end. Your Honor, there has never been a case finding Date-of-Hire in a merger context of [sic] violation of the duty." [Doc. # 482 at 1757.]
>
> FN10. *Air Wisconsin* also notes in dictum that liability could attend a length-of-service seniority list, that is, a list based upon date-of-hire that accounts for time spent on furlough. 909 F.2d at 215, 217.

USAPA concedes the broad sweep of its argument, which implies that the Railway Labor Act does not permit "hopelessly irreconcilable labor groups to enter into a binding neutral process to resolve their mutual disagreement so they can go forward on

their areas of mutual interest." [Doc. # 574, at 1071 (question from the Court).] To agree with this conclusion would dismantle the framework of honest intentions and fair dealing, of stability and consistency, that is the premise of all bargaining, not less labor negotiations. To this extent-an extent as limited and minimal as it is important-the Nicolau Award constrains USAPA as a preexisting discharge of its duty, not to be abandoned without justification.

Practical problems also dog USAPA's argument. Even if date-of-hire seniority were a *per se* legitimate union objective, what about qualified date-of-hire seniority? USAPA's own proposal includes conditions and restrictions professed to mitigate its date-of-hire aspect. At what point would such conditions and restrictions forfeit the dateof-hire immunity? The fact is, USAPA's very decision to include conditions and restrictions is an acknowledgment that the date-of-hire method is sometimes a Procrustean fit.

5. USAPA's Impasse-Related Objective

USAPA asserts that its seniority proposal was justified by its necessity to get any new single CBA. In USAPA's view, ALPA's system of requiring both pilot groups to ratify any new CBA doomed all progress. First, the East MEC had withdrawn its representatives from the Joint Negotiating Committee, halting CBA negotiations indefinitely. Second, USAPA asserts that the East Pilots would never ratify the arbitrated seniority proposal as part of any new CBA. The evidence of a supposed impasse requiring sacrifice of the West Pilots to angry East

Pilots was pretextual; in any event, it did not persuade the jury or the Court that an actual impasse existed; and the so-called impasse could not, as a matter of law, justify USAPA's actions toward the West Pilots and the Nicolau Award.

i. Pretext

The evidence well supports the conclusion, implicit in the verdict and persuasive to the Court, that any asserted impasse was a pretext for bare favoritism of the East Pilots. As soon as the Nicolau Award was announced, USAPA's founder and future president Mr. Bradford wrote that it was necessary to leave ALPA "if this award stands" and "just to protect what little we have left." [Ex. 107 at 1-2.] Later, an attorney advised Mr. Bradford to conceal this objective. [Ex. 14.] A USAPA memo dated February 10, 2008, stated that an attorney had advised USAPA that "if we could replace ALPA as the bargaining agent we could prevail in achieving a Date of Hire seniority integration." [Ex. 315 at 4.] The same memo states, "If ALPA is not there, the award is not there." It shows a deleted sentence stating that "USAPA would not exist" if any lawyer had advised that the renegotiation of seniority was "not possible or very dangerous and likely to fail." Editorial annotations explain that the deletion was necessary to avoid the appearance that "Ni[c]olau is the only reason for USAPA's existence." [Ex. 315 at 5.] USAPA publicly expressed the sentiment that "ALPA = Nicolau." [Ex. 39.] Some pre-election USAPA correspondence refers to an impasse, but USAPA's "Frequently Asked Questions" pages from the campaign invoke date-of-hire seniority without any discussion of impasse. [Ex. 37, 39, 96, 100-105.]

When USAPA does talk about the impasse, it promises to "overturn" the Nicolau Award without any explanation of why this step is needed to get around ALPA's dual-ratification structure. [Ex. 39.] Mr. Bradford, who is beyond the subpoena power of this Court, missed an opportunity for persuasion when he declined to testify and be cross-examined at trial concerning motives and pretext in defense of the union he founded and governed.

ii. Non-persuasion

The East MEC's walkout from the negotiations did not create an impasse. ALPA possessed the constitutional power to place the recalcitrant East MEC into trusteeship to continue negotiations toward a single new CBA. [Ex. 509/2189 at 89-90.]; *see also Air Wisconsin,* 909 F.2d at 215 (describing use of trusteeship powers to resolve seniority dispute). The former chairman of the West MEC Negotiating Committee testified that ALPA officials were discussing that possibility after negotiations broke down. [Doc. # 475, at 372.] Before certification, USAPA repeatedly asserted that a contract was likely to be presented for ratification soon. [*E.g.*, ex. 100 at 3, 7.] And Doug Mowery, an East Pilot formerly on ALPA's Joint Negotiating Committee, lamented in a March 2008 letter that the East MEC was likely to be placed in trusteeship. [Ex. 20, at 2.] FN11

> FN11 USAPA had every opportunity to present evidence that ALPA had abandoned use of its trustee powers, but USAPA did not present any, relying instead upon misrepresentations of the record. [*E.g.*, Doc.451 at 10-

> 11; 482 at 1774-81, 1789-94, 1798-1802]. ALPA pledged not to deprive the two pilot groups of their separate ratification rights, but that pledge would not be inconsistent with imposing a trusteeship on the East MEC in order to conclude, short of ratification, a single CBA incorporating the Nicolau Award.

Nor did the evidence show that the two pilot groups would never ratify a single CBA under ALPA. It is wholly speculative to say the East Pilots would vote against any single CBA incorporating the Nicolau Award no matter how long separate operations continued and no matter the cost to them. The East MEC passed a resolution stating that the East Pilots would never ratify a CBA containing the Nicolau Award, but this self-serving statement about an unknown future is not binding or even persuasive.

Moreover, speculation about what could have been ratified under the ALPA voting system became irrelevant when USAPA was certified as bargaining representative on April 18, 2008. USAPA's structure allows a simple majority of the membership to ratify a new CBA. The lack of an actual and legitimate union purpose for jettisoning the Nicolau Award and the promised improvements in wages and working conditions from a new CBA may yield a majority coalition of East and West Pilots, if not at first, at least eventually.

iii. Legal insufficiency

Even if an impasse did exist, it would not justify USAPA's actions as a matter of law. Majority oppo-

sition does not defeat the duty of fair representation; the duty exists to restrain the majority. *Air Wisconsin,* 909 F.2d at 216. USAPA's argument would allow a union to punish any disfavored minority by pointing to the majority preference in the union as long as that majority threatens to obstruct the collective bargaining process, in this case by hijacking contract ratification. Discrimination and bad faith would be permitted as long as a zealous majority of union members insisted. Majority will alone does not corrupt union action. *See Rakestraw,* 981 F.2d at 1533 ("If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm."). It does not exculpate all union action, either. The union's obligation to federal labor law includes an obligation to stand up to its membership. USAPA argues that ALPA's merger policy only requires the union to use "all reasonable means" to implement the Nicolau Award, but this phrase is quoted out of context. The policy requires the union to use "all reasonable means ... to compel the company to accept and implement the merged seniority list." [MP Pt. 1.I.1.] It does not allow the union to capitulate to an abusive majority.[FN12]

> FN12. As a historical matter, the duty of fair representation could not have developed if this impasse theory were valid. Surely, in those early cases, unions that discriminated against black workers were catering to a stubborn racism of the majority. The duty would mean nothing if a majority could undo it by force of stubbornness.

This principle goes to the core of union politics and bargaining assumptions. A union is required to explain agreements to union members prior to a mandatory ratification vote. *White v. White Rose Food, a Div. of DiGiorgio Corp.*, 237 F.3d 174, 183 (2d Cir.2001). Before and after its election, USAPA has misled the majority about its power to improve their seniority prospects at the expense of the West Pilots. The will of the East Pilots springs from a mistaken understanding of the law and mismanaged expectations. If this is an impasse, it is one USAPA goaded on.

If the membership were correctly advised on the limits of fair representation that constrain the agreement-and all the collective bargaining of every union-then they would perceive no incentive to hold out for an improper bargaining objective. Those employees would be left with a choice: To vote in favor of ratifying a single CBA that incorporated the Nicolau Award, or to vote against it. What they could not do is vote against it and expect the next CBA or the next union to violate the duty of fair representation in the very same way as the first one could not. In effect, USAPA claims that the East Pilots hold such strong objections to the Nicolau Award that they always will vote as a bloc against any new CBA with it, enjoying the self-denial of a single CBA with improved wages and working conditions into perpetuity. Even if this unbelievable story is believed, it only means that the East Pilots have the power of self-inflicted harm. It does not mean that the union's duty of fair representation falls victim to self-hostagetaking.

Whether considered as a matter of fact or law, the asserted impasse does not absolve USAPA from liability.

6. USAPA's Other Objectives

USAPA asserted a range of other union objectives. These included compliance with its union constitution, compliance with majority will, dissatisfaction with ALPA policies and procedures, and dissatisfaction with the procedures of the Nicolau Arbitration. All of these objectives were rejected as a matter of law.

(1) USAPA's constitutional commitment to date-of-hire seniority does not excuse its acts. "The interpretation or construction of the constitution and laws of a union is for the union." *Laturner v. Burlington N., Inc.*, 501 F.2d 593 (9th Cir.1974) (quoting *Wirtz v. Local Union No. 125, Int'l Hod Carriers B. & C.L. U.*, 270 F.Supp. 12, 16 (N.D.Ohio 1966)). However, that interpretation does not govern if it would cause the union to "transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or contravene public policy or the law of the land." *Local Union No. 125*, 270 F.Supp. at 16 (quoting 87 C.J.S. Trade Unions § 13, at 766 (late ed.)); *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14*, 453 F.2d 1018, 1024-25 (9th Cir.1972) (union's internal policies and practices are subject to the duty of fair representation).

(2) Political expediency standing alone-whatever it takes to win an election-does not provide a legitimate union objective. *Truck Drivers, Teamsters Lo-*

cal Union No. 42, Barton Brands, and the Ninth Circuit's *Hardcastle* case say with one voice that a union cannot act solely to benefit a majority of employees in the bargaining unit at the expense of the minority.

(3) Dissatisfaction with ALPA policies and procedures, unrelated to the Nicolau Award, could not provide a legitimate objective. The evidence suggested that some East Pilots had general complaints about ALPA and that the seniority issue was just the last straw. The testimony centered on a lack of direct representation, extravagant lifestyles of union officials, loss of pension rights, inadequate contract terms, and inferior safety policies. They also complained that more than a decade ago ALPA, instigated by other pilot groups, subverted a merger that would have benefitted U.S. Airways pilots. The pilots may have had many reasons for abandoning ALPA and they were entitled to do so. But this case does not turn on the rejection of ALPA. It turns on USAPA's consequent motivation to present a new seniority proposal to the airline. For these reasons, the instructions prevented the jury from finding that "dissatisfaction with the practices or policies of the previous union, ALPA, unrelated to the merged pilot seniority list" was a legitimate union objective in this case.

(4) Dissatisfaction with the previously agreed-upon ALPA merger procedures was not a legitimate union objective. Honest disagreement required honesty up front. It was only after the Nicolau Award was issued, and the pilots lost their veil of ignorance, that so many East Pilots decided that the procedures were inherently unjust. The union can-

not satisfy its duty by catering to this self-interested hindsight.[FN13]

> FN13. The evidentiary and legal failure of all of USAPA's alleged objectives might have supported summary judgment or judgment as a matter of law. However, the urgency of the case did not leave time to brief and decide summary judgment motions before trial, and Plaintiffs' motion for Judgment as a Matter of Law did not address the issues necessary for such a ruling. [Doc. # 446.]

7. Taxonomy of Liability

It is clear that USAPA's conduct violates its duty as set forth in a special genre of fair representation cases. It is less clear what subheading of liability applies: The duty of fair representation prohibits conduct that is arbitrary, discriminatory, or in bad faith. This metaphysical question has no impact on the outcome under existing law, but it has enthralled both parties.

At the outset, USAPA's failure to adopt the Nicolau Award is not "arbitrary" in the technical sense. The exercise, even the wrongful exercise, of a union's policy judgment-including CBA interpretation-is virtually immune to charges of arbitrariness; liability under this heading has been limited to procedural or ministerial acts. *See Beck v. United Food & Commercial Workers Union, Local 99,* 506 F.3d 874, 879 (9th Cir.2007); *Peters v. Burlington N. R.R.,* 931 F.2d 534, 540 (9th Cir.1990). The question then remains whether such union actions may be considered "discriminatory" or "in bad faith."

In truth, both headings support liability, separately and together. The original fair representation cases concerned racial discrimination, *see Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), and clearly the duty excludes all forms of invidious discrimination based upon protected classes. *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir.2003). However, the Ninth Circuit has expressly held that it is "too restrictive" to limit liability to cases of invidious discrimination, and that impermissible discrimination may take other forms. *Id.* at 618-19. For this reason, the jury was instructed that "discriminatory" action could be a basis for liability. The instructions articulated the difference between lawful and unlawful treatment of different employee groups, granting the union wide latitude to resolve conflicting interests even if the resolution adversely affects one group, as long as the union took action to further a legitimate union objective. Contrary to the objections of USAPA, these instructions articulated the contours of unlawful "discrimination" as expressed in the applicable cases. *See Bernard*, 873 F.2d at 216 (prohibiting discrimination "on the basis of union membership"); *Barton Brands*, 529 F.2d at 799 (prohibiting discrimination against the smaller of two merging workforces); *Air Wisconsin*, 909 F.2d at 217 (union's duty prohibits discrimination against "a group of dissidents on the outs with union's leadership"); *Truck Drivers*, 379 F.2d at 144 ("campaign promise to discriminate" against politically weaker employee group is a promise to breach duty of fair representation); *Ramey*, 378 F.3d at 277 (holding that "a union violates [its duty] when it causes an employer to discriminate against employees on arbi-

trary, hostile, or bad faith grounds") (quoting *Barton Brands,* 529 F.2d at 799); *Teamsters Local Union No. 42,* 825 F.2d at 611-12 (holding, without limitation, that "discrimination" on the basis of union membership is an unfair labor practice) (citing fair representation cases). USAPA "discriminated" when it adopted a seniority proposal for no reason other than to advantage the majority East Pilots at the minority West Pilots' expense.

USAPA also complained at the instruction stage that the jury was given no definition of "bad faith." The Supreme Court has defined "bad faith" in this context as requiring a showing of "fraud, deceitful action, or dishonest conduct," or personal hostility. *Humphrey v. Moore,* 375 U.S. 335, 348, 350, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); *accord Conkle v. Jeong,* 73 F.3d 909, 916 (9th Cir.1995) (referring to "personal animus" as a basis for "bad faith" liability). At the same time, the Supreme Court has often resorted to the rule that a union's discretion is subject to "good faith and honesty of purpose." *See Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 75-76, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991); *Metro. Edison Co. v. NLRB,* 460 U.S. 693, 707, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983); *United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56, 67 n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 564, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); *Humphrey,* 375 U.S. at 342; *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

In civil law, the forms of fraud range to the bounds of human imagination. 17 Am.Jur. *Fraud* § 1 (2009). "In fact, the fertility of people's invention in

devising new schemes of fraud is so great that courts have always declined to define the term, reserving to themselves the liberty to deal with fraud in whatever form it may present itself." *Id.* (listing nineteen judicial definitions of fraud); *see also Keith v. Murfreesboro Livestock Market, Inc.*, 780 S.W.2d 751, 754 & n. 2 (Tenn.App.1989) (citing Dante Alighieri's personification of fraud as the demon Geryon, a reptile-scorpion-mongrel of a man, to illustrate why fraud is not subject to a "hidebound definition"). The "fraud" or "bad faith" at issue here is an abuse of trust akin to a deliberate breach of fiduciary duties. "Just as a trustee must act in the best interests of the beneficiaries, a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith." *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (citation omitted); *accord O'Neill*, 499 U.S. at 75. The jury instructions omit the phrase "fraud, deceitful action, or dishonest conduct" because those terms add nothing to the analysis. Instead, the jury was instructed on a union's duty to represent with "good faith and honesty of purpose," a phrase better suited to the situation here where the union is accused of brandishing a pretext to justify majority self-dealing at the expense of West Pilots. Much as a definition of fraud would add nothing to an adequate instruction on embezzlement, no further definition of "bad faith" was needed. The instructions predicate any liability on the specific facts of USAPA's conduct.

Seniority dispute cases are conceived in terms of both "bad faith" and "discrimination." Cases imposing liability cite both standards. *See Bernard*, 873

F.2d at 216 (holding that union may treat groups of employees differently "as long as such conduct is not arbitrary or taken in bad faith"); *Barton Brands,* 529 F.2d at 799 (prohibiting discrimination "on bad faith grounds"); *Truck Drivers,* 379 F.2d at 142 (faulting union for "renounc[ing] any good faith effort to reconcile" employee interests); *Ramey,* 378 F.3d at 276-77 (union has obligation to "exercise its discretion with complete good faith and honesty") (quoting *Vaca,* 386 U.S. at 177); *Teamsters Local Union No. 42,* 825 F.2d at 611 (same). In these cases, the distinction matters little. "Bad faith" and "discrimination" become two different labels for the same theory of liability. None of the applicable cases trouble over this issue of nomenclature, and perhaps rightly so. *Cf. Jones v. Trans World Airlines, Inc.,* 495 F.2d 790, 798 (2d Cir.1974) (rejecting, pre-*O'Neill,* the strict compartmentalization of fair representation claims and holding that varied labels only serve to emphasize the range of a union's broad discretion). *But see Rakestraw,* 989 F.2d at 945-48 & n. 2 (Ripple, J., dissenting from denial of rehearing *en banc*) (criticizing panel decision for abandoning the tripartite "arbitrary, discriminatory, or in bad faith" standard, which *O'Neill* reaffirmed, in favor of a "crabbed interpretation of the duty of fair representation"). It may be that "bad faith" and "discrimination" merge into a single concept that describes the ills at work in this case. *See Bernard,* 873 F.2d at 216 (prohibiting bad-faith disparate treatment of workers); *Williams v. Pac. Maritime Ass'n,* 617 F.2d 1321, 1330 (9th Cir.1980) (same); *Ramey,* 378 F.3d at 277 (same). The terminological difference does not affect its proof or defense.

USAPA also objected that Plaintiffs never pled discrimination, that Plaintiffs waived the discrimination instruction on multiple occasions, and that Plaintiffs objected to it in the drafting phase before finally accepting that term in the final instructions.[FN14] [Doc. # 482, at 1898.] All of these contentions lack merit. The First Amended Complaint did not mention "discrimination" as a basis for liability because it pled more generally that USAPA acted "arbitrarily, for improper purpose, and/or in bad faith." [Doc. # 86 at 22.] This pleading encompasses the theoretical vestibule of unlawful discrimination, which is a type of "improper purpose." The November 20, 2008 order denying USAPA's motion to dismiss repeatedly referred to discrimination as an operative theory of liability. [Doc. # 84, at 8, 10-13, 18-19.] Plaintiffs have confined their liability case to the facts pled, and their unofficial objections to the discrimination instruction did not comport with applicable law. It is sophistic at best for USAPA to claim surprise here. It was USAPA who first requested, over Plaintiffs' unofficial objection, an instruction on discrimination. [Doc. # 348, at 86-87.]

> FN14. The referenced objections of Plaintiffs took place during open dialogues about jury instructions and were not Plaintiffs' formal objections. As the Court advised the parties, "for purposes of the rules of civil procedure, the only objections to jury instructions that will count for making the record will be the ones you make at the end. The dialogue that we have in the process are not objections. They are not sufficient. I don't treat them as such. And everyone will have a chance at the

> end to make their record. But that's not how I see the purpose of the dialogues we have up until then." [Doc. # 390, at 37.]

B. Subject Matter Jurisdiction and Ripeness

Jurisdiction being a prerequisite to all remedies, the Court reaffirms its prior holdings on subject matter jurisdiction and ripeness. Adjudicating this case does not intrude upon the jurisdiction of the System Board of Adjustment or the National Mediation Board. [*E.g.* doc.84, at 17-22; 104; 250 at 2; 288 at 3.] Although the Railway Labor Act generally requires exhaustion in breach-of-CBA suits against an employer, there is no statutory or contractual exhaustion requirement in this fair representation suit. The fact that a CBA-the Transition Agreement-and its interpretation form part of the fabric of the fair representation claim does not preclude jurisdiction. Neither the System Board of Adjustment nor the National Mediation Board possesses the statutory power to address or remedy a fair representation claim of this nature. 45 U.S.C. §§ 184 (granting System Board of Adjustment jurisdiction over "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions"); 45 U.S.C. §§ 152 Ninth, 155, 183 (granting National Mediation Board jurisdiction over election disputes and disputes "between an employee or a group of employees and a carrier or carriers" regarding contract negotiation and other issues).

The Court also maintains its prior conclusion that this case is ripe for adjudication. USAPA has challenged this point repeatedly, most recently on motion for judgment as a matter of law. [Doc. # 445.] At the beginning of the case, the Court held that the claims were ripe because, according to the allegations, it was enough to allege that USAPA has breached its duty by deliberately delaying the single collective bargaining agreement, thereby causing injury to the West Pilots in the form of ongoing furloughs and other detriments. [*See* Doc. # 84:12-13.] During discovery, Plaintiffs retreated from any notion of deliberate delay on the part of USAPA. As has already been held, this change in the factual predicate presents no ripeness problem. [Doc.449; 482 at 1755-56.]

1. Ripeness Doctrine

Two factors govern the inquiry into whether a case is ripe: "the fitness of the issues for judicial decision," and "the hardship to the parties of withholding court consideration." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 433 F.3d 1199, 1211-12 (9th Cir.2006). Both factors favor jurisdiction here.

The issues fit for decision are these: Whether USAPA adopted and presented its seniority proposal without any legitimate union objective, solely to benefit East Pilots at the expense of West Pilots, and if so whether the West Pilots are entitled to damages and an injunction therefor. *See id.* at 1212 (noting that ripeness hinges on "the precise legal question to be answered"). The jury answered the first question in the affirmative. A ruling on relief

need not wait for further facts to eventuate themselves. Plaintiffs' case does not rest upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cardenas v. Anzai,* 311 F.3d 929, 934 (9th Cir.2002) (quoting *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). USAPA concedes that it will never bargain for implementation of the Nicolau Award. [Doc. # 574 at 1047.] It is constitutionally hostile to doing so. The Airline has accepted the Nicolau Award, expressing no opposition to it, and the union has failed to show any legitimate reason (or plausible future reason) for abandoning it. Liability flows from the process and aims of USAPA's seniority position. The outcome of negotiations is irrelevant. Without an injunction, USAPA's seniority position inevitably impairs the collective bargaining process.

For this same reason, denying judicial review would work a substantial hardship upon the parties, including the Airline. The prospect of a single new CBA holds significant economic consequences for all U.S. Airways pilots, whose wages, working conditions, furloughs, and demotions are on the line. In addition to depriving West Pilots of legitimate representation, USAPA's bargaining position leaves the Airline to decide between a lack of a single CBA and an unlawful single CBA.

2. Remedial Concerns

The practicalities of the remedy also support ripeness. As discussed further on, effective relief is available in the form of an injunction requiring USAPA to negotiate for the implementation of the

Nicolau Award, which the Airline has already accepted. Even if a CBA were in place, relief could only set aside that agreement and restore the union's proper negotiating position-it could not impose a permanent new CBA term. *H.K. Porter Co., Inc. v. NLRB,* 397 U.S. 99, 107-09, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970) (forbidding NLRB from prescribing terms of CBA); *Hyatt Mgmt. Corp. of N.Y. v. NLRB,* 817 F.2d 140, 143 (D.C.Cir.1987) (noting that the rule also applies to the courts); *see also Bernard v. Air Line Pilots Ass'n, Int'l,* 873 F.2d 213, 215, 217-18 (9th Cir.1989) (affirming injunction that set aside "tainted" agreement, established a temporary seniority system, and required union adherence to ALPA merger policy as a new seniority bargaining position). To withhold relief until the conclusion of corrupted negotiations would accomplish nothing but delay-a hardship to all parties.

3. Limitations Cases

Cases from the limitations context confirm that the claim is ripe. Claims are ripe, at the latest, when the statute of limitations begins to run. *See, e.g., Norco Const., Inc. v. King County,* 801 F.2d 1143, 1146 (9th Cir.1986); *Hensley v. City of Columbus,* 557 F.3d 693, 696 (6th Cir.2009). The statute of limitations runs on fair representation claims from the time that the asserted injury becomes "fixed and reasonably certain." *Archer v. Airline Pilots Ass'n Int'l,* 609 F.2d 934, 937 (9th Cir.1979). The West Pilots' asserted injury was "fixed and reasonably certain" as of the time that USAPA presented its seniority proposal to the Airline for improper purposes, abdicating its responsibility to ne-

gotiate on behalf of both groups impartially and in good faith.

Ramey undergirds this conclusion. *Ramey* held that a union's unequivocal announcement of an intent to breach its duty would only give rise to a ripe claim in limited circumstances. 378 F.3d 269, 278-79 & n. 4 (2d Cir.2004). However, a claim does accrue when the union acts on that intention by presenting its seniority proposal to the company, before the conclusion of a CBA. *Id.* at 279-80. Though the facts of *Ramey* and this case are not identical, the analytical framework is apt.

> The duty of fair representation owed by a union to its members is similar to a contractual duty, and the union's announcement of its intent to advocate against its members' interests may be compared to a party's anticipatory repudiation of a contractual duty. In some anticipatory repudiation cases the aggrieved party may sue immediately after the repudiation is announced. However, the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due.... Applying this principle to the case at bar, the cause of action accrued on the date on which performance was due, namely the date on which [the union] advocated a position on the seniority issue to USAir.

Id. USAPA points out that at the time that the *Ramey* plaintiffs happened to sue, the union had already reached agreement with the airline on seniority integration. This contention misses the point.

The above language makes clear that the *Ramey* plaintiffs' claim accrued prior to the execution of the agreement. The same circumstances are present here. USAPA has made plain its intent never to bargain for the Nicolau Award, and it has advocated its date-of-hire seniority proposal to the company.

4. Other Authority

USAPA has cited no precedential authority for dismissing a fair representation claim on ripeness grounds. Indeed, USAPA has cited no federal appellate authority discussing ripeness in the labor context. Perhaps such cases are scarce because the typical inquiry in a fair representation suit is whether a union's past action violated its duty of fair representation-a question ripe by definition. Such was the inquiry in this case, and so it does not raise paradigmatic ripeness concerns of record development or temporal standing. Plaintiffs sought and obtained an adjudication of past and present union action.

USAPA has repeatedly suggested that only the "final product of the bargaining process" is subject to fair representation claims, citing *Air Line Pilots Association v. O'Neill,* 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). [*E.g.*, doc. # 36 at 13.] This phrase, carefully plucked from its context, is too slender a reed to support such an elephantine proposition. *O'Neill'* s statement that "the final product of the bargaining process may constitute evidence of a breach of duty" was not directed at ripeness, but rather at the "arbitrariness" standard of reviewing union actions. Reuniting the phrase

with the rest of the quoted sentence makes its meaning clear: "[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.' " *Id.* (citation omitted).

O'Neill did not concern the accrual of fair representation claims. It simply held that the union's duty of fair representation, including the arbitrary-discriminatory-bad faith framework, "applies to all union activity, including contract negotiation." *Id.* at 67; *see also Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 329, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969). Nothing in *O'Neill* prevents the imposition of liability for negotiating activities prior to the conclusion of a CBA. Rather, the case suggests that the liability may arise sooner because the agreement is only considered as "evidence" of a breach rather than the breach itself. *O'Neill* 's application of the duty of fair representation to "contract negotiation" underscores this conclusion. 499 U.S. at 67.

It may be the rare case where a redressable fair representation claim accrues in the midst of labor negotiations, which are usually dynamic and uncertain, but it happened here. In USAPA's hands, the Nicolau Award's time of death has passed; only the time of the funeral is uncertain. The Transition Agreement resolved the union's internal seniority conflict by way of the Nicolau Award, which USAPA wholly abandons solely to benefit one group of pilots over another. Indeed, this particular breach of the duty implicates both negotiation and administration of collective bargaining agreements.

See id. at 77 (doubting that "that a bright line could be drawn between contract administration and contract negotiation" in every case).

Another district court, considering a suit by a different set of pilots against USAPA, has accepted USAPA's ripeness argument. *See Breeger v. USAPA*, No. 08-CV490, 2009 WL 1328902, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). In *Breeger*, certain East Pilots brought a fair representation suit against USAPA, alleging that USAPA failed to meet a constitutional obligation to reshuffle East Pilot seniority positions established by prior mergers. The district court adopted a Magistrate Judge's Report and Recommendation, dismissing the case in reliance on *O'Neill* as well as a selection of unpublished federal decisions and state cases. The Report states, "The parties have not cited, and the undersigned is unaware of, any published federal authority addressing whether a union's conduct may give rise to a ripe [fair representation] claim prior to the conclusion of negotiations with the employer." It does not address the context of *O'Neill'* s "final product of the bargaining process" language. It makes no mention of *Ramey*, which was not presented to the court in any brief. The holding of *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, cited in the Report, does not preclude suit before a CBA was in place; that case recognized a fair representation claim arising out of a union's failure to reach agreement with the employer, noting that fair representation suits may challenge both CBAs and "the negotiations leading to them." 756 F.2d 1262, 1273 (7th Cir.1985). Nor is *Federal Express Corp. v.Air Line Pilots Association* applicable here; that case denied

declaratory judgment standing in the midst of labor negotiations because there was no "reasonable apprehension of litigation." 67 F.3d 961, 964 (D.C.Cir.1995). Although the Report does not specifically discuss hardships or the fitness of the issues for judicial decision, the dismissal for lack of ripeness may have reflected the shapelessness of the plaintiffs' theory. The *Breeger* plaintiffs sued to challenge the union's working date-of-hire seniority proposal under a broadly worded constitutional commitment to date-of-hire-seniority, with little more than conclusory allegations of bad faith and discrimination. *See Air Wisconsin,* 909 F.2d at 215-19 (rejecting a similar challenge on the merits).

Nor does the reasoning of *Brooks v. Air Line Pilots Association, International* compel dismissal. --- F.Supp.2d ----, 2009 WL 1883108, 2009 U.S. Dist. LEXIS 55210 (D.D.C. June 30, 2009). In that case, a fair representation claim was dismissed on ripeness grounds because it challenged the position a union took in an administrative grievance proceeding. The outcome of the grievance proceeding, and therefore the harm to the pilots, was entirely contingent and discrete. Conversely, the West Pilots' harm here is not "fear that [USAPA] may succeed with its advocacy," *Brooks,* 2009 WL 1883108, at *3, 2009 U.S. Dist. LEXIS 55210, at *9. It is the present, concrete loss of fair representation, a loss that is certain to continue, which will invalidate or preclude any single collective bargaining agreement with the Airline.

Like *Breeger, Brooks* does not address *Ramey.* This Court need not say whether, under the foregoing analysis, factual distinctions would require a dif-

ferent result in *Breeger* or *Brooks*. To the extent any general statements in those cases conflict with the above reasoning, the Court respectfully departs from their analysis in the specific circumstances of this case.[FN15]

> FN15. Other limitations cases USAPA cites offer little guidance because they concern grievance proceedings, *Barlow v. Am. Nat'l Can Co.*, 173 F.3d 640, 643-45 (8th Cir.1999), the adequacy of pension plan change notices, *Mitchota v. Anheuser-Busch, Inc.*, 755 F.2d 330 (3d Cir.1985), or other claims founded on the execution of a collective bargaining agreement or subsequent events, without discussion of prior culpable acts. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir.2004); *Hagerman v. United Transp. Union*, 281 F.3d 1189, 1197-98 (10th Cir.2002); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 873 (6th Cir.1988); *United Indep. Flight Officers*, 756 F.2d at 1273.

C. Declaratory and Injunctive Relief

Plaintiffs seek three forms of relief at this stage: (1) A declaration that the Airline and its pilots, as represented by USAPA, are contractually bound to incorporate the Nicolau Award; (2) an order directing USAPA "with equal West Pilot representation" to negotiate a complete single CBA that incorporates the Nicolau Award, and then to present that CBA for a single ratification vote by all USAPA members; (3) an order enjoining USAPA and East Pilots, until the single CBA is in effect, from filing grievances that would impair the company from imple-

menting the Nicolau Award.[FN16] At this stage, only the second request, in modified form, will be granted.

> FN16. Plaintiffs originally sought relief directing the Airline to begin using the Nicolau Award for promotions and furloughs by a date certain, even if a new CBA has not been finalized. Plaintiffs withdrew this request during bench trial proceedings. [Doc. # 485, at 58.] For this reason, the bench trial testimony of Plaintiffs' witness Brian Stockdell regarding Airline logistics is not considered and does not affect the analysis. *See supra* n. 3.

1. Declaratory Relief

No declaratory relief will be granted. The First Amended Complaint contains no specific prayer for declaratory relief, only a general request for "other relief that the Court deems necessary and proper." [Doc. # 86.] *See Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, 943 (9th Cir.2009) (stating that declaratory relief must be pled like any other form of relief). Moreover, because a permanent injunction will issue, it is unclear what additional effect a declaration would have respecting the union's breach of its duty. "Where more effective relief can be obtained by other proceedings, and consequently a declaratory judgment would not serve a useful purpose, the courts are justified in refusing a declaration." *Allis-Chalmers Corp. v. Arnold*, 619 F.2d 44, 46 (9th Cir.1980) (quoting *Zenie Bros. v. Miskend*, 10 F.Supp. 779, 782 (S.D.N.Y.1937) and citing Bor-

chard, *Declaratory Judgments* 302, 303 (2d ed.1941)); 6A *Moore's Federal Practice* ¶ 57.08(3) (2d ed.1979)). Plaintiffs' first requested form of relief will not be granted.

2. Availability and Propriety of Injunctive Relief

The Supreme Court has expressly allowed injunctive relief in fair representation suits. *Vaca,* 386 U.S. at 195. The appropriateness of such relief varies with the facts of each case, but the Court possesses the power to enjoin the union. *Id.*

USAPA objects that an order directing the union to negotiate for the implementation of the Nicolau Award would violate an age-old rule against the governmental imposition of collective bargaining results, chiefly citing *H.K. Porter Co., Inc. v. NLRB,* 397 U.S. 99, 108-09, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970), and *O'Neill,* 499 U.S. at 74. This rule is inapplicable. The remedy in question will do no such thing. In fact, USAPA relies upon doctrine that undermines its own position. *O'Neill* holds that despite *H.K. Porter Co.* and related authority, courts may review substantive contract terms in fair representation suits. 499 U.S. at 75-77. *Hyatt Management* holds that although the NLRB cannot compel acceptance of new bargaining terms, it is nonetheless "authorized to order the offending party to execute and honor" an existing agreement that it had repudiated. 817 F.2d at 142; *accord Fisk Univ.,* 237 NLRB 1164, 1171-72 (1978); *Raven Indus., Inc.,* 209 NLRB 335, 335, 337-38 (1974); *cf. also Amalgamated Clothing & Textile Workers Union,* 246 NLRB 747, 748 n. 4 (1979) (NLRB will not

compel union to sign company settlement proposal where union had not agreed to that proposal because doing so would potentially "forc[e] the parties to rewrite the contract in contravention of" *H.K. Porter*).[FN17]

> FN17. USAPA quotes *Hyatt Management'* s additional statement that "neither the courts nor the Board can change or nullify substantive contractual provisions." 817 F.2d at 143. *Hyatt Management* relies in turn upon *Pacemaker Yacht Co. v. NLRB,* which contains a more complete and persuasive statement of the rule: "Absent a contractual provision in irreconcilable conflict with federal labor policy, neither courts nor the Board may modify or nullify substantive contractual provisions." 663 F.2d 455, 460 (3d Cir.1981). Though the Court is not asked to invalidate any contractual provision at this time, a provision that discriminates in violation of the duty of fair representation may be "in irreconcilable conflict with federal labor policy" and therefore subject to judicial invalidation. *See Bernard,* 873 F.2d at 217 (affirming injunction that "set aside" an agreement "tainted" by a breach of the duty of fair representation).

Like the NLRB, a court can compel a union to follow self-imposed, nondiscriminatory rules where a failure to do so breaches the duty of fair representation. In *Bernard,* the Ninth Circuit endorsed a preliminary injunction akin to the permanent injunction sought here. 873 F.2d at 217. Invalidating an agreement that contained discriminatory senior-

ity provisions, the district court found that "a new agreement would have to be executed." *Id.* The injunction required ALPA to follow its own negotiation, mediation, and arbitration process in adopting a bargaining position on seniority rights. *Id.* at 215, 217; *see also Beardsly v. Chicago & N.W. Transp. Co.,* 850 F.2d 1255, 1271 (8th Cir.1988) (cited by USAPA) (remanding with instructions to vacate an unlawful agreement and order the union to negotiate "in line with the [procedural] requirements set forth" in a previous agreement). In *Bernard,* as here, an injunction enforces the duty of fair representation by negating an improper bargaining position. A future arbitration was mandated in *Bernard;* here, the arbitration already took place, and the Airline accepted the result. This difference in timing does not affect the Court's ability to enforce the union's duty.

This remedial authority gives due regard for freedom of contract. The requested relief does not purport to thrust on the union new or previously unagreed-upon terms. It merely restores the union to the fulfillment of its duty. *O'Neill,* 499 U.S. at 74. *Bernard* did not examine the source of the district court's authority to order such relief, but *Vaca* leaves that authority subject to circumstances. No lesser remedy would be adequate. The complex intangibles of seniority rights, which affect a wide array of working conditions, defy expression in purely monetary terms. To the extent that the duty of fair representation limits union action, enforcement must follow.

USAPA correctly asserts that the Court is generally without power to enjoin individuals who are not

parties to the litigation. Fed.R.Civ.P. 65(d) (providing for injunctive powers against parties and their "officers, agents, servants, employees, and attorneys, and ... other persons who are in active concert or participation with [them]"); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir.2009). The East Pilots as a class and the Airline are not agents of the union. No injunction or declaration will issue that is directly enforceable against all East Pilots or the Airline without affording them a full and fair opportunity to be heard. To the extent Plaintiffs seek such relief, their third request is rejected on this basis. However, this rule would not necessarily apply to an injunction against the union that affects employee rights. *See Butler v. Local Union 823, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 514 F.2d 442, 455 (1975) (holding that such an injunction, in appropriate circumstances, does not require joinder of individual employees because it merely enforces an existing legal restraint on the union), *overruled on other grounds by Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 45 n. 6, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) (punitive damages), *and United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) (statute of limitations).

3. Scope & Nature of Injunctive Relief

USAPA will be ordered to negotiate in good faith for the implementation of the Nicolau Award, defending that award in negotiations and presenting it with the single new CBA to the pilots for ratification vote. This remedy was requested by Plaintiffs and pled in the First Amended Complaint. It prom-

ises to address the problem at hand without limiting the negotiation of independent employment terms. Implicitly, it also precludes the union from acting to undermine the Nicolau Award through collateral provisions in the agreement, and from failing to negotiate toward a single CBA that includes the Nicolau Award.

This injunction and order also illuminates USAPA's untoward objectives, informing the Airline and union members what the union is not permitted to do. To date, the Airline has accepted the Nicolau Award and taken no bargaining position against it. The injunction to follow protects the Airline in that course. The West Pilots' original claims against the Airline for breaching the Transition Agreement were dismissed for lack of subject matter jurisdiction for failing to state any facts that suggested the Airline was acting in concert with USAPA toward improper seniority objectives. The Airline's incentive to avoid needless liability places another healthy constraint on USAPA's bargaining.

USAPA will also be required to negotiate for the implementation of the Nicolau Award as part of any single CBA, unmodified by additional conditions and restrictions USAPA would place upon it. USAPA claims that it has the right to impose new conditions and restrictions, invoking the historical fact that ALPA exerted pressure on the West MEC to accept some form of "mitigation" of the Nicolau List. This very fact undercuts USAPA's request. ALPA exerted pressure because it did not hold unilateral power to deprive the West MEC and the West Pilots of the arbitrated outcome. The West Pilots remain entitled to a union that will not abro-

gate the Nicolau Award without a legitimate purpose. Any waiver of that right must be "consensual." [Ex.1034 at 1; 1092; 1094.] A jury and this Court have found the union to be motivated by wrongful objectives, and abundant evidence supports that finding. It would indulge those objectives to allow USAPA to alter the Nicolau Award, and it would bestow upon USAPA an unlawful power that ALPA neither possessed nor asserted.[FN18]

> FN18. USAPA also argues that the First Amended Complaint sought implementation of the "Nicolau List" rather than the "Nicolau Award," and so it left open the union's power to change the Nicolau Award's conditions and restrictions. The Court does not comb the First Amended Complaint so finely, nor does the prayer for relief so tightly restrict the powers of equity. ALPA Merger Policy provides that the union shall defend the "opinion and award." [MP pt. 1.H.5.b.]

Similarly, USAPA will be forbidden from negotiating separate CBAs for the two pilot groups, as it argues the Transition Agreement and the Railway Labor Act would have permitted it to do.[FN19] Separate negotiations would invite highly probable wrongdoing, which would evade effective judicial remedy and burden the Plaintiffs with more ruinous litigation expense. The evidence shows not only USAPA's wrongful motives but also willingness to conceal those motives and to bring about its seniority objectives by subterfuge. Prior to trial, USAPA negotiated only toward a single CBA for both pilot groups. It was only when the verdict was returned that USAPA announced to the Court its intent to

seek separate agreements. [Doc. # 485, at 58, 78-81.] When asked at oral argument several weeks later who held the right to ratify any separate CBA, USAPA could provide no answer. USAPA should not have the opportunity to strike disparate contract terms for the two pilot groups, making up by indirection for the failure to meet East Pilot seniority ambitions.

> FN19. Cases cited by USAPA merely hold that it is generally not forbidden to negotiate separate agreements for different groups in a bargaining unit; they do not address the remedial concerns of this case. *See Ass'n of Flight Attendants v. United Airlines,* 71 F.3d 915, 919 (D.C.Cir.1995) (noting that the National Mediation Board discourages separate bargaining agreements for different groups of employees within the same bargaining unit); *Ass'n of Flight Attendants v. USAir, Inc.,* 24 F.3d 1432, 1437 (D.C.Cir.1994); *Bishop v. Air Line Pilots Ass'n, Int'l,* No. 98-359, 1998 WL 474076, at *9, 1998 U.S. Dist. LEXIS 11948, at *27 (N.D.Cal.2005); *Grand Trunk W. R.R.,* 19 N.M.B. 226, 232 n. 1 (1992).

USAPA could state no legitimate union reason for pursuing separate agreements. It asserted only that the Court's order would deprive the union of self-help remedies associated exclusively with those agreements. This is not so. The National Mediation Board certified both pilot groups as a single craft, that is, a single bargaining unit, in January 2008. *US Airline Pilots Association,* 35 N.M.B. 65, 78 (2008). The parties do not dispute that the West Pi-

lots' CBA is currently amendable, and the East CBA becomes so very soon. At that point, USAPA would be free to invoke Section 6 procedures for both CBAs, including the National Mediation Board's mediation/arbitration process and possible self-help, in order to negotiate a single CBA that would alter wages and working conditions for the entire bargaining unit. Nothing in the Transition Agreement or the Railway Labor Act provides otherwise. Section V of the Transition Agreement specifies that no rights under the Railway Labor Act are waived, and it provides for additional private mediation regardless of what contracts are amendable. The injunctive remedy poses no harm to the Airline, which has at all times sought the operational integration that a single CBA would bring. If these conditions were to change, either party could seek focused relief from the permanent injunction.

The public interest favors this remedy as well. Separate labor agreements would materially deprive U.S. Airways of the business benefits, now four years delayed, of a merger and combined operations, for no apparent reason but to enable continued unlawful discrimination within the union. To shut this door is part of the minimum necessary to end the game. The pilots must choose between the status quo and a single new CBA that incorporates the Nicolau Award with whatever improvements in wages and working conditions USAPA can negotiate for the East Pilots and the West Pilots alike.

The injunction will not address speculative examples of malfeasance. It will not restrain USAPA's

grievance machinery in order to thwart a hypothetical East Pilot plot to obstruct negotiations by filing seniority grievances. There is no evidence of any threat of a bad-faith grievance campaign. If it happens in the future, it may be the proper subject of enforcement or modification of the permanent injunction. The Court will expressly retain jurisdiction to modify, extend, or vacate relief, which should be adequate to meet any unforeseen events.

The injunction will not subject any new CBA to a majority vote of the West Pilots (as Plaintiffs pled) or to a majority vote of each separate pilot group (as USAPA requests as a fall-back). Both requests lack legal grounding. The USAPA constitution requires ratification of any new CBA by a majority vote of the entire membership. The allegations and proof contain nothing to suggest that USAPA's representational structure amounts to a breach of its duty; USAPA indicates that the West Pilots have been and always will be free to join the union. To grant either of the suggested remedies would, without justification, countermand the election and certification of USAPA as collective bargaining representative. Plaintiffs' proposal goes even farther because it would grant one group of pilots (the West Pilots) a unique power to veto a new proposed CBA for any reason, not just a cure for the violation of a legal right. Plaintiffs' request that USAPA be enjoined to negotiate "with equal West Pilot representation" is too vague to be understood and will not form part of relief.

The Court also rejects USAPA's bold request that the injunction dissolve upon a failed vote to ratify a new CBA containing the Nicolau Award. The duty

of fair representation requires USAPA and any successor union to bargain for the implementation of the Nicolau Award. To limit relief as requested would enable the easiest of evasions of this duty. As already explained, the abusive wishes of the majority do not become legitimate simply because they are asserted in a ratification vote. A failed ratification vote gives the union no new power to accommodate a discriminatory majority.

IV. ORDER

The jury has found USAPA liable to Plaintiffs and the represented class. Damage proceedings remain for the six named Plaintiffs, except for the claims for general refund of union dues and fees, which have been denied as a matter of law. All claims in No. CV 08-1728 PHX-NVW have been adjudicated in favor of the Defendants. It is appropriate now to enter a permanent injunction and a final and enforceable judgment on all claims except Plaintiffs' unadjudicated individual damage claims. The Court does so by a separate Partial Judgment and Permanent Injunction filed herewith. The Court expressly finds no just reason for delay in entry of that judgment and expressly directs that it be entered immediately.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Directed Verdict [doc. # 446] is denied as moot.

IT IS FURTHER ORDERED that Defendant USAPA's Renewed Motion for Judgment as a Matter of Law [doc. # 567] and Motion for a New Trial [doc. # 590] are denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Supplement the Record [doc. # # 580, 582] is denied for the reasons stated in open court on the record.

APPENDIX C

MCCASKILL-BOND AMENDMENT

Public Law 110-161

121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007)

SEC. 117. LABOR INTEGRATION.

(a) LABOR INTEGRATION.—With respect to any covered transaction involving two or more covered air carriers that results in the combination of crafts or classes that are subject to the Railway Labor Act (45 U.S.C. 151 et seq.), *sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the integration of covered employees of the covered air carriers;* except that—(1) if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section; and

(2) the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered em-

ployees of a covered air carrier shall not be affected by the requirements of this section as to the employees covered by that agreement, so long as those provisions allow for the protections afforded by sections 3 and 13 of the Allegheny-Mohawk provisions.

(b) DEFINITIONS.—In this section, the following definitions apply:

(1) AIR CARRIER.—The term "air carrier" means an air carrier that holds a certificate issued under chapter 411 of title 49, United States Code.

(2) COVERED AIR CARRIER.—The term "covered air carrier" means an air carrier that is involved in a covered transaction.

(3) COVERED EMPLOYEE.—The term "covered employee" means an employee who—

(A) is not a temporary employee; and

(B) is a member of a craft or class that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.).

(4) COVERED TRANSACTION.—The term "covered transaction" means—

(A) a transaction for the combination of multiple air carriers into a single air carrier; and which

(B) involves the transfer of ownership or control of—

(i) 50 percent or more of the equity securities (as defined in section 101 of title 11, United States Code) of an air carrier; or

(ii) 50 percent or more (by value) of the assets of the air carrier.

(c) APPLICATION.—This section shall not apply to any covered transaction involving a covered air carrier that took place before the date of enactment of this Act.

(d) EFFECTIVENESS OF PROVISION.–This section shall become effective on the date of enactment of this Act and shall continue in effect in fiscal years after fiscal year 2008.

(emphasis added).

APPENDIX D

LABOR PROTECTIVE PROVISIONS

Allegheny-Mohawk Merger Case,
59 C.A.B. 22, 45 (1972)

Section 3. Insofar as the merger affects the seniority rights of the carrier's employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. *In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.*

* * *

Section 13. (a) In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein which *cannot be settle by the parties within 20 days after the controversy arises*, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for

consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and *a decision shall be rendered within 90 days after the controversy arises,* unless an extension of time it is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. *The decision of the arbitrator shall be final and binding on the parties.*

(b.) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure unless and until that alternative method or procedure shall have been agreed to by all parties.

(emphasis added).